

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: CIVIL PART  
ATLANTIC COUNTY  
DOCKET NO.: ATL-L-2648-15  
A.D. # \_\_\_\_\_

IN RE: JOHNSON AND JOHNSON) TRANSCRIPT  
TALCUM-BASED POWDER) OF  
PRODUCTS LITIGATION) MOTION  
)

Place: Atlantic County Civil Crt.  
1201 Bacharach Blvd.  
Atlantic City, NJ 08401

Date: May 3, 2024

BEFORE:

HONORABLE JOHN C. PORTO, J.S.C. AND  
RUKHSANAH L. SINGH, U.S.M.J.

TRANSCRIPT ORDERED BY:

JEFFREY M. POLLOCK, ESQ., (Fox Rothschild, L.L.P.)

APPEARANCES:

JEFFREY M. POLLOCK, ESQ., AND  
AUSTIN W.B. HILTON, ESQ., (Fox Rothschild, L.L.P.)  
Attorneys for Plaintiff

STEPHEN D. BRODY, ESQ., (O'Melveny & Myers,  
L.L.P.)  
Attorney for J&J and L.T.L. Mngt.

ERIK HAAS, ESQ., (Johnson & Johnson W.W.V.P.L.)  
In-House Attorney for Johnson & Johnson

Transcriber: Nitsa Carrozza  
PHOENIX TRANSCRIPTION  
796 Macopin Road  
West Milford, NJ 07480  
(862) 248-0670

Audio Recorded  
Recording Opr: Kavonna Smith

I N D E X

Colloquy/Housekeeping.....PAGE  
3,75,119,132

MOTION TO DISQUALIFY:

<u>WITNESSES FOR</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
<u>THE DEFENDANT:</u>				
A. Birchfield		20	77,129	121
by the Court	66,94			

<u>EXHIBIT:</u>	<u>Ident.</u>	<u>Evid.</u>
Hearing Ex 4 E-mail	41	
Hearing Ex 7 Letter	44	
Hearing Ex 15 Press release	48	
Plenary Ex 56, Ex 5 Transcript	110	
JJ-1 Privilege log	128	
JJ-1-A Excerpt	128	
JJ-1-B Excerpt	128	
P-3 Unknown doc.	132	

1 (Proceeding commenced at 9:38:36 a.m.)

2 COURT OFFICER: All rise for Judge Rukhsanah  
3 Singh and John Porto.

4 THE COURT: Thank you, good morning,  
5 everyone, please be seated. Very nice to see everyone.  
6 This is In Re: Johnson and Johnson Talc-Based Product  
7 Litigation, docket number ATL-L-2648-15 and M.D.L. case  
8 2738, M.C.L. case 300. May I have the appearance of  
9 counsel? We'll start with Mr. Pollock.

10 MR. POLLACK: Good morning, Your Honor, how  
11 are you?

12 THE COURT: Fine, thank you, good to see you.

13 MR. POLLACK: Here on behalf of Mr.  
14 Birchfield and the Beasley Allen Law Firm and I'm  
15 joined with my Associate, Austin Hilton.

16 THE COURT: Thank you, good morning, everyone  
17 and Mr. Brody?

18 MR. BRODY: Good morning, Your Honor, Steve  
19 Brody from O'Melveny and Meyers, for Johnson and  
20 Johnson and L.T.L. Management, L.L.C.

21 THE COURT: Thank you, good morning to you.  
22 Mr. Haas?

23 MR. HAAS: Good morning, Your Honor, it's  
24 Erik Haas on behalf of Johnson and Johnson.

25 THE COURT: Thank you, good morning to you.

1 We've been together so many times. We have a  
2 continuation of your client's testimony, Mr. Pollock.  
3 We've got the correspondence, we got the attorney's  
4 eyes only material and anything to address before we go  
5 forward with the testimony?

6 MR. POLLACK: I think there's two preliminary  
7 matters and if the Court, Courts, the Courts can run  
8 this any way they want. One is the admission of P-5.  
9 P-5 was the document that was the response from Mr.  
10 Conlon.

11 The issue that we tried to work it out as  
12 counsel, we could not. Opposing Counsel is objecting  
13 to the statement by Mr. Conlon he did not recommend.  
14 There was testimony on this point. I submitted a  
15 correspondence. At some point, we need to address that  
16 issue but it doesn't need to be addressed now. If you  
17 want to, we can but it's completely up to you and my  
18 Opposing Counsel.

19 The second one is the belated submission of  
20 time sheets in a redacted format. And I don't know  
21 whether you want to hear oral argument on this now or  
22 if you want formal submissions but I object to it. I  
23 object to it because I asked for it prior to these  
24 hearings. I objected to it because UNA says that you  
25 can produce it in-camera but it didn't say you can

1 produce it in-camera after three key witnesses have  
2 taken the stand and left.

3 And in particular, Mr. Conlon, who they're  
4 attacking. They've had these documents, they've  
5 prepared an Excel sheet. So if you want me to, I can  
6 prepare a formal response but I understand that the  
7 Court did invite submission of these documents and I've  
8 read the transcript and I'm sure you know what you said  
9 but to me, this is completely violative of due process  
10 as far as Mr. Conlon's rights.

11 And I don't represent him but the fact is, by  
12 implication if you will, they're saying the two of us  
13 are hooked together. So I would like to know, does the  
14 Court want oral argument right now, does it want to  
15 have briefing later on? How would Your Honors like to  
16 proceed? Because I do object to their admission.

17 THE COURT: Let's hear from Mr. Brody first  
18 and then what we can do is, I'm not so sure about oral  
19 argument right now, maybe let's start with the  
20 testimony. Judge Singh and I will confer after we hear  
21 from Counsel and then we will render our thoughts and  
22 decision on that issue, okay? Mr. Brody?

23 MR. BRODY: Certainly, Your Honor and as Your  
24 Honors are aware, after the lunch break on April 10th,  
25 the Court indicated that Johnson and Johnson would be

1 entitled to make an in-camera, attorney's eyes only  
2 submission, with redactions where we felt redactions  
3 needed to be made in order to maintain privilege.

4 Really, as impeachment of instances where Mr.  
5 Conlon testified to things that are flatly contradicted  
6 by the record of what he did as J and J's Counsel, J  
7 and J's Outside Counsel on Talc Litigation, on these  
8 very matters, over the course of the 20 months where he  
9 represented the company. And so that's what we did. I  
10 think that -- I don't think there's an objection to the  
11 submission of impeachment evidence, that would be  
12 proper.

13 I do think that if Mr. Pollack wants to, in  
14 the briefing that Your Honors have indicated you wish  
15 to receive from the parties after the conclusion of  
16 this hearing, if he wants to argue as to how that  
17 should or should not be considered by the Court and the  
18 weight that it should be given as impeachment, he's  
19 certainly entitled to do that and the briefing will  
20 give him the opportunity to do that.

21 And the Court then will have an opportunity  
22 to decide how, based on the briefing, it wants to  
23 consider those materials and the extent to which it  
24 believes that those materials are material to its  
25 evaluation on Mr. Conlon's credibility and his

1 testimony overall.

2 THE COURT: Well, our record is not closed.  
3 There has not been any decision on closing the record.  
4 So you know, keeping in mind, you know, we also have a  
5 confrontation issue, right, with regard to certain  
6 material. And I'm going to suggest to you that Judge  
7 Singh and I, you know, perhaps anticipated this  
8 argument that, you know, maybe there's another way to  
9 address this, Mr. Brody and Mr. Pollock. So let's  
10 start with the testimony, Judge Singh and I will confer  
11 and we'll address counsel, all right?

12 MR. BRODY: Thank you.

13 MR. POLLACK: Understood.

14 THE COURT: So all right. With the testimony  
15 today of Mr. Birchfield, can you give us at least an  
16 understanding or a head's up with regard to time frame?  
17 This is continuation, candidly, of Mr. Birchfield's  
18 testimony. Do you think we're going to be all day?

19 MR. BRODY: No, I don't think we're going to  
20 be all day and I was looking back at the transcript  
21 from April 10th and I saw that I told the Court at 4:30  
22 p.m. that day that I thought I had 30 minutes left. It  
23 might be 40 but I'm going to try to hold close to what  
24 I said on the 10th.

25 THE COURT: That just gives us an idea about,

1 you know, where our day is, okay.

2 MR. BRODY: And obviously, how long we're  
3 here then will depend on what Mr. Pollack raises with  
4 Mr. Birchfield and any redirect that I may have.

5 THE COURT: Thank you, Mr. Brody. Mr.  
6 Pollack, any thoughts? You know, we don't have a  
7 stopwatch on everybody.

8 MR. POLLACK: I know and I --

9 THE COURT: But just to give us an idea.

10 MR. POLLACK: I balance the fact that I  
11 respect both judges have been patient and you've  
12 committed the time to this hearing. I do thank you for  
13 that. I understand you also want to get this job done  
14 and I respect that too. It did not miss me that  
15 yesterday, Mr. Haas went out on national press on the  
16 news and attacked Mr. Birchfield and his firm on the  
17 same theme he's attacking him here today, that this is  
18 self-interest, that this is just a big pay-day for  
19 Beasley Allen, et cetera.

20 I'm also very mindful that with regard to the  
21 -- one of the things they're directly attacking is  
22 whether Beasley Allen should maintain its position on  
23 the Talc Claimants Committee and should it be involved  
24 in the future? I have to take this job seriously  
25 because I respect and I know the Beasley Allen Firm is



1 committed to what it's doing.

2 I have to allay any concerns you have that,  
3 that firm is not out there for a pay-day, they are out  
4 there to protect their clients. Mr. Birchfield will  
5 explain that on the stand and respectfully, it takes  
6 whatever time it takes. I'll do it as quickly as I can  
7 but obviously, we were very patient with Mr. Haas, who  
8 talked at nauseam in narrative.

9 And I therefore, I don't want to waste your  
10 time but I also -- I can't commit to a specific time  
11 frame. I'll do it as quickly and as efficiently as I  
12 can but as you both understand, this is a very serious  
13 matter for a firm that is completely committed to its  
14 clients. I have to protect them.

15 THE COURT: This Court, I didn't see any  
16 comments and you know, I'll have Judge Singh address it  
17 too. This Court has no position with regard to Mr.  
18 Birchfield or J and J. It's the decision here with  
19 regard to this decision is going to be based upon the  
20 facts and the facts only. Whatever is going on in the  
21 litigation and whatever the comments are pro or against  
22 any of the firms have no bearing, Mr. Pollock and Mr.  
23 Brody, on this Court's decision, on this particular  
24 issue or even going forward, should we have any  
25 substantive issues.

1           We have trial coming up in September,  
2           although it's not with Beasley Allen but under no  
3           circumstances have I heard or thought anything that  
4           would cause this Court to recuse itself or to issue an  
5           adverse decision relating to either J and J or Beasley  
6           Allen.

7           MR. POLLACK: Right so just -- look, you both  
8           have been living with me for a long time now, I'm  
9           pretty straight to the point. The real question is  
10          1.6, you and I talked about that. Was there a  
11          disclosure? There's been zero evidence of a  
12          disclosure, none. There's been not even one proffer  
13          that there's a disclosure.

14          So my firm belief is, the real reason that J  
15          and J is pursuing this nonsense is that they believe  
16          that they can attack, in the news, in the press, every  
17          place in the world, and especially before the Federal  
18          Court and perhaps in the State Court, they can attack  
19          the Beasley Allen Firm and say, this firm has got to  
20          go, it's a problem child, it shouldn't be here. And  
21          that is absolutely crystal clear to me, that's what's  
22          going on.

23          So I do understand that's not the decision  
24          you're making here today, Judge Porto. You're here to  
25          decide whether a motion to disqualify should be granted

1 but you're also both smart enough to know this case has  
2 a life and the fact is, Mr. Murdica is out there  
3 beating the van, trying to collect plaintiffs' lawyers,  
4 so that Mr. Haas can get to his 70 or 75 percent of  
5 people, which he has announced in the national press  
6 yesterday.

7           They're playing this whole process for time.  
8 So I do agree that we're here on a very specific little  
9 matter and frankly, shouldn't be here in my humble view  
10 but I also am quite aware that there is a broader  
11 spectrum and that is why I have to go into some detail  
12 with regard to the commitment that the Beasley Allen  
13 Firm has, the fact that it did not need any information  
14 whatsoever from Jim Conlon because they knew far more  
15 than Jim Conlon would ever have known regarding any of  
16 these matters. I have to be able to develop that  
17 theme.

18           THE COURT: Okay and Judge Singh?

19           JUDGE SINGH: No, I would like to comment. I  
20 do appreciate the concerns. It is panly evident that  
21 there are things going on between the parties and the  
22 media. That is not what is before the Court, I echo  
23 Judge Porto's comments in that regard. What is before  
24 the Court is, at least in the M.D.L. motion, the  
25 request for the entry of an order to show cause as to

1 the disqualification.

2 We are here to hear the evidence. Although  
3 we are asking in terms of managing our expectations for  
4 today's time frame --

5 MR. POLLACK: Yep.

6 JUDGE SINGH: I don't believe Judge Porto or  
7 I have any intent on limiting the testimony without  
8 actually hearing what will be presented on the front  
9 end, as to what Mr. Birchfield intends to testify in  
10 response to your examination. But I would like to take  
11 the opportunity to again remind the parties that we are  
12 here to determine this particular issue based off of  
13 the record presented. Not only the declarations and  
14 certifications previously submitted but also, the hours  
15 of testimony that both Judge Porto and I have had the  
16 opportunity to hear. So thank you, Judge Porto.

17 MR. POLLACK: Thank you.

18 THE COURT: You're welcome, Judge Singh.

19 MR. POLLACK: And if I may briefly just  
20 respond on behalf of Johnson and Johnson and Mr. Haas.  
21 Mr. Haas -- and first of all, I think that the events  
22 of this week, frankly, are relevant to the  
23 disqualification issue that is before the Court because  
24 they speak to the ongoing prejudice to Johnson and  
25 Johnson of having Beasley Allen and Mr. Birchfield and

1 Ms. O'Dell both representing plaintiffs in the  
2 litigation, in the M.D.L., in the M.C.L., on a going  
3 forward basis, as evidenced by the events this week,  
4 where Johnson and Johnson announced a proposed plan  
5 that would resolve these cases.

6 It was immediately criticized in the press by  
7 Mr. Birchfield, by Ms. O'Dell, by the Beasley Allen  
8 Firm, I mean within an hour or so of when it was  
9 announced. And Mr. Haas responded to the statements  
10 that were made first by Mr. Birchfield. And so it's --  
11 but as a whole, it is something that we will likely get  
12 into to a degree today because it is directly relevant  
13 to how the parties are positioned, where Beasley Allen  
14 and Mr. Birchfield are positioned with the benefit of  
15 their relationship that they have, as Judge Snyder  
16 referred to it, the collaboration, with Mr. Conlon,  
17 over a long period of time, unbeknownst to Johnson and  
18 Johnson last year and it creates what is not just a 1.6  
19 issue.

20 And I understand why Mr. Pollack repeatedly  
21 refers to this as a narrow 1.6 issue but it's a 1.9  
22 issue, it's a Rule 5.3 issue, it's a Rule 8.4 issue.  
23 It is much broader than whatever Mr. Pollack wants to  
24 put it but all of this, including the events of this  
25 week, are relevant to that question and to the Court's

1 evaluation of what is the right answer going forward  
2 and what has to happen here.

3 MR. POLLACK: May I respond, Your Honor?

4 THE COURT: Sure but let's keep in mind, this  
5 Court, you know, we live in the world, these courts,  
6 live in the real world. We understand what is going on  
7 and we can focus on what is at issue here and I can  
8 assure you, whatever is out there, is not going to  
9 infect this Court's decision with regard to the  
10 underlying issue of disqualification.

11 MR. POLLACK: I understand, Your Honor and  
12 I'm not arguing with you, I'm not quivering at all.  
13 The only point I would make on that is that, what you  
14 say and how you say it is going to have ramifications  
15 and reverberations down the road, right? Because the  
16 fact is, this transcript, these hearings, these  
17 discussions, I promise you, Mr. Birchfield and his firm  
18 will be seeing it for years and Mr. Haas and Mr. Brody  
19 or someone else will be using it as a lever for years  
20 to come. So how we articulate it is going to be  
21 important.

22 I would like to step back for one second.  
23 When we first talked years ago, it was literally last  
24 year. We were talking about Trupos, we were talking  
25 about UNA Builders, et cetera and when I spent, I don't

1 know, 20 years, 15 years, on the Ethics Committee,  
2 another ten on the Character and Fitness Committee.

3 When someone is being attacked or someone is  
4 being accused of an ethical violation, it usually is  
5 referred to the Ethics Committee. That's what those  
6 people do, that's what I did for years. And typically,  
7 the person who is being accused or being challenged or  
8 being -- or is being attacked, is told exactly what it  
9 is they allege to have done.

10 They're told with precision, this is the  
11 client fund you should not have taken, this was the  
12 alcoholism and drugs which unfortunately is about half  
13 the matters we deal with. It was a specific allegation  
14 of negligence and miscarriage or something along those  
15 lines.

16 In this case, it has been a constant  
17 morphing. Mr. Brody's first oral argument before you,  
18 Judge Porto, was there is no ethical violation, no  
19 R.P.C. on point we can find, none. Judge Singh, you  
20 asked the question pointedly; do I need to find an  
21 R.P.C. violation to disqualify? The answer from Mr.  
22 Brody, no.

23 He and I disagree vehemently on this point  
24 and by the way, I think the Supreme Court of New Jersey  
25 is squarely in my corner on this one. Once you got rid

1 of the appearance of impropriety, which they did in  
2 1984 under the following condition --

3 THE COURT: '93?

4 MR. POLLACK: I'm sorry, '93, I apologize.  
5 Once they came out with that one, at that point, the  
6 reality is that, we shouldn't be here. Because I  
7 understand you want to do a credibility determination.  
8 If that's what we're focused on, then the credibility  
9 can be determined by, is Andy an honest guy, was Andy's  
10 firm committed to his clients, you know, why are they  
11 opposing the bankruptcy if you want to.

12 You can get into all those issues but what  
13 Mr. Brody is now saying is; let's just try all the  
14 issues right here. I'm ready to do it. If that's what  
15 we want to do, I'm ready to do it and we will proceed  
16 but I just think that, the reason the Supreme Court  
17 said you should decide it on the papers, unless -- and  
18 you grabbed onto this, Judge Porto. I'm not  
19 criticizing you but you appropriately said; hey, I have  
20 some issues, I want to look at credibility. It's not  
21 supposed to be a free-for-all.

22 Now I'm looking at RPC 1.6, sharing of  
23 confidential information. Somehow, I'm now looking at  
24 1.9, 1.10. I have other rules that I haven't even  
25 looked at yet that Mr. Brody is now articulating. I've



1 never, in my 35 years of practice, seen an ethics  
2 matter, which this is becoming, alleged where someone  
3 is not told; this is what you're accused of doing and  
4 that is a real problem here.

5 So I -- if we want to have the scope be  
6 broad, Mr. Brody is arguing that this week's  
7 discussions show that, you know, that Mr. Haas is a  
8 great guy and Beasley Allen is a bad guy. How is that  
9 conceivably relevant in any way to the question of  
10 whether Mr. Conlon shared confidential information with  
11 my client? Isn't that the issue we're here before?

12 THE COURT: That's what Judge Singh and I  
13 believe the issue is, that's.

14 MR. POLLACK: To me but we've -- if we go  
15 miles and miles beyond that, it had ramifications --

16 THE COURT: I haven't seen it go that far and  
17 I don't think Judge Singh has either.

18 MR. POLLACK: Well, he just argued he wants  
19 to do it and I'm concerned.

20 THE COURT: Well, I didn't hear that yet but  
21 you know, squarely is; did Mr. Conlon share  
22 confidential information with Beasley Allen? You know,  
23 if I were to write a decision today, I would say, the  
24 issue before this Court is; did Mr. Conlon share  
25 confidential Johnson and Johnson information with

1 Beasley Allen.

2 MR. POLLACK: I'm with you.

3 THE COURT: And I will then start with the,  
4 as we did in law school, rules, analysis, conclusion.

5 MR. POLLACK: Yep.

6 THE COURT: Credibility, based on the seven  
7 factors that are found candidly in our evidence rules,  
8 consistency, et cetera, does it make sense? And  
9 understandably, I was also thinking about this on my  
10 way in is, you have the charge where it's false in one,  
11 false in all. You know, does that come into play with  
12 regard to credibility? So I think, and I'll turn the  
13 dias, the bench over to Judge Singh, but that's the  
14 issue that we're here for.

15 MR. POLLACK: I'm with you.

16 THE COURT: That's it, Judge Singh?

17 JUDGE SINGH: I don't disagree and you are  
18 all familiar with Federal Court standards for motions  
19 for disqualification written, as well. So we are  
20 looking at the same issue and the ramifications  
21 thereof.

22 MR. BRODY: Absolutely and the questioning  
23 that I -- the 30, 40 minutes that I have, is focused on  
24 wrapping up the rest of that and hopefully, giving the  
25 Court what it needs in order to evaluate the questions

1       that it's going to have to evaluate here.

2               It's -- you know, certainly, this is not an  
3       appearance of impropriety case, this is a case of  
4       actual impropriety and we are looking forward, based on  
5       the record that's been developed, to setting that out  
6       in the briefing that the Court has asked for and  
7       explaining precisely why it is that you have actual  
8       impropriety, you have actual violations of the ethical  
9       rules and why it is that disqualification is required  
10      here.

11             MR. POLLACK: Thank you, Your Honor.

12             THE COURT: All right, thank you. Mr.  
13      Birchfield, we're going to administer the oath one more  
14      time today, May 3rd, 2024. Mr. Birchfield, please  
15      raise your right hand, tell us your name and spell your  
16      last name, sir?

17             A. BIRCHFIELD: Andy Birchfield, B-I-R-C-H-F-  
18      I-E-L-D.

19      A N D Y   B I R C H F I E L D, DEFENDANT WITNESS, SWORN

20             THE COURT: Thank you, you may be seated, Mr.  
21      Birchfield. Mr. Brody?

22             MR. BRODY: Yes, good morning, Mr.  
23      Birchfield.

24             THE WITNESS: Good morning.

25

1 CROSS EXAMINATION BY MR. BRODY:

2 Q Do you recall providing testimony on April  
3 10th about a draft term sheet that was exchanged  
4 between your firm and Legacy?

5 A Yes.

6 Q All right and we had looked at, we had given  
7 you a copy of the full privilege log that was prepared  
8 by the Plaintiff Steering Committee, asserting  
9 mediation privilege over documents that we had  
10 subpoenaed from K.C.I.C., do you recall that?

11 A Yes.

12 MR. BRODY: All right. I've prepared and if  
13 I may approach, an excerpt of that to make it a littler  
14 easier to talk about the term sheet. I'm happy to give  
15 you the full privilege log, as well. I see you didn't  
16 bring another copy of it up with you but I prepared an  
17 excerpt with the references to the term sheet, taken  
18 directly from that, which I thought would make it  
19 easier. If I may approach?

20 THE COURT: You may approach. Did you share  
21 that with Mr. Pollack?

22 MR. BRODY: Yes, I did.

23 MR. POLLACK: Yes, I have a copy, Your Honor.

24 MR. BRODY: I can give you the bigger one  
25 which has larger font, if --

1 THE WITNESS: I'll try this, let me try.

2 MR. BRODY: If that would be helpful, all  
3 right.

4 BY MR. BRODY:

5 Q Now, we're going to take this in  
6 chronological order. We've sorted the spreadsheet that  
7 the P.S.E. provided to us, we've put it in  
8 chronological order here. So going in chronological  
9 order, starting at the top. The first time we see your  
10 name is on May 12th of last year; right? It's the  
11 second entry.

12 A The second entry on here is May 12th, yes.

13 Q And you're listed as the author; correct?

14 A Correct.

15 Q And you're listed as the author of a draft  
16 term sheet for Legacy Ovarian Cancer Claim Proposal;  
17 right?

18 A Correct.

19 Q All right and then if you continue, just  
20 below the two entries with your name, you see that on  
21 the 16th of May, Mr. Conlon --

22 MR. POLLACK: Mine is May 24th. Oh, up top.  
23 Okay, got it.

24 MR. BRODY: Yep, we're on the 16th.

25 MR. POLLACK: All right.

1 BY MR. BRODY:

2 Q The document number for the record is 111; do  
3 you see it?

4 A Yes.

5 Q And so on the 16th, Mr. Conlon forwarded the  
6 proposal to K.C.I.C., right?

7 A I see that entry.

8 Q And the Plaintiff Steering Committee has  
9 asserted mediation privilege over that communication,  
10 as well; right?

11 A Yes.

12 Q Because your position is that the mediation  
13 privilege covers Mr. Conlon's communications with  
14 K.C.I.C. in this instance; right?

15 A I presume so.

16 Q Yeah, as well as what you wrote in your  
17 communications with Mr. Conlon; correct?

18 A Yes.

19 Q And there are a number of e-mails back and  
20 forth addressing the term sheet. And then if we go  
21 down in the green, which gets us to May 24th, which is  
22 about 12 days after your name first appears and we see  
23 your name again; right? It's number 20 in the document  
24 number column?

25 A Yes.

1 Q And that's May 24th, 2023; correct?

2 A Yes.

3 Q And that's again the Draft Term Sheet for  
4 Legacy Ovarian Cancer Claim Proposal; right?

5 A Yes.

6 Q But this time, what was on the 12th of May a  
7 seven page document has grown to eight pages; hasn't  
8 it? If you look at the page count column.

9 A I see that entry on here.

10 Q Right and it looks like there are a number of  
11 copies of it. You know, you see Document 42, Document  
12 135, they are all eight pages; right?

13 A That's the entries here, yes.

14 Q All right. Now if you flip over to the next  
15 page. And we move forward to June 7th, it's  
16 highlighted in green at the bottom; do you see that?

17 A Yes.

18 Q And do you see the Document Number 45?

19 A Yes.

20 Q That document, Document Number 45, you're the  
21 author of that; right?

22 A I'm listed as the author, yes.

23 Q And that's a Draft Term Sheet for Legacy  
24 Ovarian Cancer Claim Proposal; correct?

25 A Yes.

1 Q And by that point which is another two weeks  
2 exactly after the May 24th version, it had grown to ten  
3 pages; hadn't it?

4 A The -- the entry here is ten pages, that is  
5 correct.

6 Q Right.

7 A I don't --

8 Q And the exact same description, Draft Term  
9 Sheet for Legacy Ovarian Cancer Claim Proposal;  
10 correct?

11 A Yes, I can't say that, that is -- the term sheet  
12 grew to -- to ten pages, that's a general description,  
13 that's the number of pages that's in the entry. I  
14 haven't reviewed, you know, to see what that  
15 transmission was but the essence of that term sheet, as  
16 I've described previously, that was our term sheet.

17 It was a term sheet that had been prepared before,  
18 before the dismissal of LTL-1, as we were -- and before  
19 the filing of J and J's second bankruptcy, we had  
20 prepared a term sheet. We had prepared a term sheet  
21 and offered to meet and present that term sheet --

22 MR. BRODY: And Mr. Birchfield, I think  
23 you're getting far afield from my question, which --

24 THE COURT: Well, let him complete his  
25 thought, Mr. Brody.



1 MR. BRODY: Sure.

2 THE WITNESS: And as I had testified  
3 previously, you know, that term sheet was prepared and  
4 there were no substantive changes in any discussions  
5 with Legacy regarding that term sheet. Scott Gilbert  
6 --

7 BY MR. BRODY:

8 Q And that's -- I think that's and just on that  
9 point, on conversations. We actually see a reference  
10 to a conversation that you had with Legacy and K.C.I.C.  
11 It's Document 118, it's the same date, June 7th, 2023.  
12 It's just three, four lines below the entry we were  
13 looking at and there's a reference to a K.C.I.C. and  
14 Legacy discussion of conversation with ovarian cancer  
15 counsel regarding comments on draft ovarian cancer term  
16 sheet; right?

17 A Right.

18 Q As well as, discussing additional ovarian  
19 cancer resolution proposal details; right?

20 A That is -- that's what the entry says and --

21 Q Yeah and ovarian cancer counsel did, as you  
22 just mentioned in your prior answer, have discussions  
23 with Legacy about the term sheet; correct?

24 A We discussed the term sheet and we provided the  
25 draft term sheet to K.C.I.C. and there were discussions

1 about how the term sheet would be applied. The terms  
2 of that agreement would be applied in a claims  
3 administration process. That was the role of K.C.I.C.  
4 --

5 Q You didn't just provide it to K.C.I.C., you  
6 also provided it to Mr. Conlon because as we saw, he  
7 forwarded on May 16th the Draft Term Sheet. He was the  
8 one who forwarded it to K.C.I.C., right?

9 A Correct because K.C.I.C. was the claims  
10 administrator that was working with Legacy, that Legacy  
11 had brought in --

12 Q And then you all got together and you  
13 discussed it and over the course of the next three,  
14 four weeks, as we see from the privilege log, the page  
15 count grew from seven to eight and then to ten pages;  
16 right?

17 MR. POLLACK: Objection, argumentative.  
18 Assumes facts not in evidence that the document  
19 actually could be red lined. We have no idea why it  
20 went from four, to eight, to ten, we have no clue where  
21 it came from.

22 THE COURT: Well, I'm going to overrule the  
23 objection but why don't you clarify with your  
24 questions, Mr. Brody, how it grew, why it grew and  
25 maybe the testimony from Mr. Birchfield will provide

1 some background with regard to the length of this  
2 particular document.

3 MR. POLLACK: Well, sure. I mean --

4 THE COURT: I don't think it's argumentative,  
5 you know, but address the question, Mr. Brody.

6 BY MR. BRODY:

7 Q Sure. Based on the privilege log, the page  
8 count for what is described as that proposal started at  
9 seven pages, became eight pages and then became ten  
10 pages; right?

11 A The entries on this privilege log do change just  
12 as you said. That does not tell me that the term sheet  
13 itself, you know, changed in any respect. So I mean, I  
14 can acknowledge that, that's what the entries say but I  
15 can't go beyond that.

16 Q Now, if I understood your testimony on April  
17 10th, the last time we were here, your position is that  
18 it was just -- and I'm going to use your words from the  
19 transcript, grammatical-type stuff that was addressed  
20 in the back and forth; right?

21 A That's correct. I mean, there were no substantive  
22 changes.

23 Q Right and you're willing to say that but  
24 you're asserting that the substance of the term sheet  
25 itself is privileged so we can't see it; right?

1 A If you want to see the term sheet, I'll be glad to  
2 show you the term sheet. What I'm not willing to do  
3 here -- I was prepared -- I was prepared on behalf of  
4 the Ovarian Cancer Committee to present that term sheet  
5 to J and J, to the General Counsel, Liz Forminard and  
6 Mr. Haas, about two weeks before the second bankruptcy  
7 petition was filed.

8 We made that offer. We were prepared to -- to  
9 share that term sheet. That is -- that is no an issue  
10 but what we were not prepared to do was to eviscerate  
11 the mediation privilege and just say -- because this is  
12 covered in the mediation process. That's why we  
13 asserted the privilege. It's not that the term sheet  
14 is secretive. This is a term sheet that would have  
15 gone to J and J. We were prepared to present it to J  
16 and J.

17 Q So you asserted the mediation privilege over  
18 the version that is described as the seven page version  
19 of the term sheet, over the eight page version of the  
20 term sheet, over what is described as the ten page,  
21 page count version of the term sheet, over the  
22 discussions that the ovarian cancer counsel had with  
23 Legacy about the term sheet? You've asserted mediation  
24 privilege over all of that; right?

25 MR. POLLACK: Objection, argumentative. This

1 is a closing argument made in the middle of  
2 questioning. Is he really -- he knows the mediation  
3 privilege has been asserted, he's already stipulated  
4 that the page count is the page count. So it's  
5 inappropriate for Counsel to be making an argument to  
6 the Court like this is a jury.

7 THE COURT: Mr. Brody?

8 MR. BRODY: I just asked him if he's  
9 asserting mediation privileges to all of the different  
10 versions of the term sheet, as well as the discussions  
11 that were had with Mr. Conlon --

12 MR. POLLACK: We're asserting mediation  
13 privilege, that's not --

14 MR. BRODY: -- and Legacy about the term  
15 sheet. It's a question for the witness.

16 THE COURT: Across all three documents?

17 MR. POLLACK: Your Honor, Judge Snyder has  
18 ruled on these issues, we're asserting mediation  
19 privilege. I'll answer for the witness, we're standing  
20 by it.

21 THE COURT: Okay, notwithstanding what Mr.  
22 Birchfield said, that he was prepared to share that  
23 document with J and J.

24 MR. POLLACK: He was prepared to provide a  
25 document to J and J, he didn't say which one. He said

1 that he was going to provide a term sheet to J and J.  
2 You have multiple variations, you have panels of  
3 counsels. I doubt that J and J would provide us a  
4 draft that has all their mark-ups.

5 We are certainly willing and able right now  
6 to provide a term sheet to them if that's what they  
7 want but I'm not going to give them a mediation  
8 privilege protected document.

9 THE COURT: Okay, so the privilege was  
10 asserted then, Mr. Brody?

11 BY MR. BRODY:

12 Q Yes and I think Mr. Pollack has just,  
13 frankly, made my point. So why don't we talk about  
14 something that was happening at the same time, these  
15 terms sheets going back and forth. The whole time that  
16 you were sending terms sheets back and forth to Legacy  
17 and K.C.I.C., you and the Tort Claimants Committee were  
18 trying to get the LTL-2 bankruptcy dismissed; right?

19 A Yes. So I'm just trying to -- I'm trying to get  
20 the timing right. I mean, we -- I mean, we had the --  
21 we did not engage, we didn't have any discussions with  
22 -- with Legacy until after -- until after the second  
23 bankruptcy petition, you know, was filed. So while --  
24 so yes, Judge Kaplan ordered mediation after LTL-2 was  
25 filed and that's the period where we were having

1 discussions with Legacy.

2 Q Right and if I -- let me make this simpler,  
3 if you'll allow me to do it this way. If I told you  
4 that the -- the Claimants Committee filed its motion to  
5 dismiss the bankruptcy on April 24th of last year,  
6 would you disagree with me?

7 A No.

8 Q All right and then as we saw, at least from  
9 the documents on the privilege log, the first version  
10 of the term sheet that you sent over to Legacy was on  
11 May 12th while that was pending?

12 A Correct.

13 Q Now you knew, of course, that Johnson and  
14 Johnson wanted planned confirmation in the bankruptcy  
15 proceeding; right? That Johnson and Johnson's  
16 objective; correct?

17 A Right.

18 Q And then you filed a motion to dismiss;  
19 correct?

20 A Yes. I mean, I didn't, the T.C.C. did but I'm  
21 part of that.

22 Q You're a part of that; right?

23 A I'm part of that, yes.

24 Q Right, I'm putting you in with the T.C.C.  
25 because you were a part of the T.C.C.

1 A Yes.

2 Q You didn't want the plan to come up for a  
3 vote; right?

4 A We -- I mean, no, we did not want J and J's plan  
5 to come up for a vote. We were prepared --

6 Q Neither did Mr. Conlon --

7 MR. POLLACK: Your Honor, they keep on doing  
8 this. I want him to answer the question, please.

9 THE COURT: Well, so does this Court. So go  
10 ahead, Mr. Birchfield.

11 THE WITNESS: Okay. So we were preparing, at  
12 the same time we were moving forward with our motion to  
13 dismiss, we were also preparing an alternative plan to  
14 be presented and we had asked the Court if the Court  
15 denied our motion to dismiss, we wanted to present an  
16 alternative plan and that would have been voted on, had  
17 Judge Kaplan not dismissed the bankruptcy and allowed  
18 us to move forward with a competitive plan.

19 BY MR. BRODY:

20 Q I guess Mr. Conlon didn't want the bankruptcy  
21 plan to come up for a vote either; did he?

22 MR. POLLACK: Objection as to speculation as  
23 to what Mr. Conlon wanted, he's not here to testify.

24 THE COURT: Unless Mr. Birchfield knows.

25 THE WITNESS: I don't know.



1 THE COURT: Okay.

2 BY MR. BRODY:

3 Q But you heard Mr. Conlon testify on April  
4 10th that if the Legacy proposal was accepted, he and  
5 Legacy would stand to make money; correct?

6 A Yes.

7 Q Right and that's not something that he would  
8 be able to take advantage of if J and J's preferred  
9 resolution, through plan confirmation in the bankruptcy  
10 court had been accomplished; correct?

11 A That's true, only if you accept the version of the  
12 plan that J and J put forward. A bankruptcy plan that  
13 did include an option for the Legacy toggle and I  
14 believe as he testified to, you know, previously. That  
15 would have been -- that would have been part of a  
16 bankruptcy plan.

17 It would have included an option, it would have  
18 been included in the alternative plan that we were  
19 putting forward. That was part of the discussions that  
20 were going on at that time.

21 Q And your alternative was not what J and J put  
22 forth; was it?

23 A No, it is very clear that what I want on behalf of  
24 my clients, which is a fair and reasonable compensation  
25 plan, is not what J and J wants and we are opposed to

1       that. It is not that we are opposed to bankruptcy  
2       period because in the very beginning, before J and J  
3       filed its first bankruptcy, we were working toward a  
4       resolution.

5               We were working toward a resolution that would  
6       have included a bankruptcy component. When J and J  
7       filed its first bankruptcy, I was pushing, as Mr. Haas  
8       knows, I was pushing for mediation --

9               MR. BRODY: We are so far afield from my  
10      question.

11              MR. POLLACK: Let him answer the question.

12              THE COURT: I'm going to let him complete the  
13      testimony. I'm not going to have a filibuster, so to  
14      speak but go ahead, Mr. Birchfield.

15              THE WITNESS: It's not that we're opposed to  
16      bankruptcy period, not in the beginning because we were  
17      trying -- we were trying to negotiate, before L.T.L.  
18      motion to dismiss, we were negotiating a plan in  
19      bankruptcy. It's only after it became very clear that  
20      we would not be able to get reasonable compensation for  
21      our clients as long as J and J had the weapon of a  
22      bankruptcy plan. That's when we became adamant --

23              THE COURT: I think that's a good place to  
24      stop, Mr. Birchfield. Go ahead, Mr. Brody.

25      BY MR. BRODY:

1 Q So Mr. Birchfield, I think, even after all  
2 that, that we are on the same page here is that, this  
3 Legacy toggle that you talked about was not what J and  
4 J was proposing and not what J and J wanted to  
5 accomplish through LTL-2 bankruptcy; correct?

6 A They did not want to do the -- they didn't want to  
7 pay the added amount that would be necessary. What J  
8 and J was saying at that point was that they wanted  
9 finality, they were looking for finality. They were  
10 taking the position that it could only be achieved  
11 through bankruptcy, which is false and the Legacy  
12 option was a way for J and J to get finality without  
13 coercing claimants into a bankruptcy plan --

14 Q That was -- that was -- I mean, let's -- you  
15 understand that J and J would object to the use of the  
16 word coerce being attached to that; right?

17 A No.

18 Q And you understand -- I mean, come on, Mr.  
19 Birchfield. J and J -- you know J and J proposed an  
20 \$8.9 billion resolution of the claims through the LTL-2  
21 bankruptcy that it wanted claimants to be able to vote  
22 on; right?

23 A That is true.

24 Q And you did not want claimants to be able to  
25 vote on that; did you?

1 A It's not that I was opposed to new claimants  
2 voting. It is -- and it's not that --

3 Q That's why you dismissed --

4 MR. POLLACK: Your Honor, please.

5 MR. BRODY: I'm sorry, he's answered the  
6 question.

7 THE COURT: Hold on, Mr. Pollack, Mr. Brody.  
8 Let me hear the full testimony based on that question  
9 first. Go ahead, do you remember the question, Mr.  
10 Birchfield?

11 THE WITNESS: That I'm opposed to claimants  
12 voting?

13 THE COURT: Right.

14 THE WITNESS: Yeah, we are not opposed to a  
15 vote that would be a fair vote. We are opposed to a  
16 plan that would essentially stuff the ballot box, in  
17 order to coerce the more serious and legitimate  
18 claimants to accept unreasonable values.

19 BY MR. BRODY:

20 Q You didn't want the claimants who would have  
21 a right to vote on the plan to be able to vote on the  
22 plan and that's why you moved to dismiss the  
23 bankruptcy; right?

24 MR. POLLACK: Objection, Your Honor, asked  
25 and answered twice now.

1 THE COURT: Well, I don't know if I heard the  
2 answer to that question. Mr. Birchfield?

3 THE WITNESS: There were multiple reasons  
4 that we were opposing a bankruptcy.

5 BY MR. BRODY:

6 Q And that was one of them; right?

7 A That -- we were opposing a vote as J and J had  
8 constructed in that plan, yes.

9 MR. BRODY: Right.

10 THE COURT: Well, let us get back to our  
11 central issue, Mr. Brody. I know it appears you're  
12 trying to lay some ground work here but let's not lose  
13 focus of what our issue is --

14 MR. BRODY: Of course, of course.

15 THE COURT: -- with regard to, as the  
16 allegations, as against Mr. Conlon.

17 BY MR. BRODY:

18 Q Of course. Mr. Mr. Birchfield, before we  
19 recessed on April 10th, you started testifying about  
20 your willingness in the fall of last year to join Mr.  
21 Conlon to present a proposed settlement matrix to J and  
22 J; do you recall that testimony?

23 A Yes, Mr. Conlon had asked me if I would --

24 Q It's just a yes -- I just asked you if you  
25 recalled that testimony, that's all I asked?

1 A Would I be willing to join with him --

2 Q No, it's a -- it's a yes or no --

3 MR. POLLACK: Mr. Brody, Your Honor, it's not  
4 a yes or no --

5 MR. BRODY: I'm just orienting him --

6 MR. POLLACK: If he needs to give a narrative  
7 response, he needs to give a -- I think it's going to  
8 be a brief answer but Mr. Brody keeps clipping off his  
9 answers because he doesn't like the answer.

10 THE COURT: Well, I don't necessarily know if  
11 Mr. Brody likes or dislikes the answer but you know,  
12 focusing-wise, what is your response to that question  
13 for your testimony, Mr. Birchfield?

14 THE WITNESS: Would you repeat the question?

15 BY MR. BRODY:

16 Q Sure. My question was simply, do you recall  
17 before we recessed on April 10th, beginning to talk  
18 about your willingness to join Mr. Conlon to present a  
19 proposed settlement matrix to Johnson and Johnson in  
20 the fall of last year; do you recall that testimony?

21 A I do not recall that testimony specifically. I  
22 did agree to, you know, meet with J and J to explain  
23 the matrix.

24 Q And we received a lot of testimony on it so I  
25 don't want to spend too much time on it but we see your

1 willingness reflected and disclosed to J and J for the  
2 first time on October 18th of last year in an e-mail  
3 from Mr. Conlon that's in your binder as Hearing  
4 Exhibit 4. Can you take a look at it?

5 A So --

6 THE COURT: Do you have that binder, Mr.  
7 Birchfield?

8 THE WITNESS: I do, I do, Your Honor. So Mr.  
9 Brody, may I ask, what is the question? Are you asking  
10 -- because you're saying that that's the first time  
11 that it was disclosed and I can't answer that.

12 BY MR. BRODY:

13 Q I'm asking you if you're familiar with that  
14 exhibit? You've seen it before?

15 A I mean, yes, I'm familiar with the exhibit since  
16 this has been filed, exhibit --

17 Q Right. Now, October 18th of last year, that  
18 was shortly after the Mass Torts Made Perfect  
19 Conference that took place in Las Vegas last fall;  
20 right?

21 A That sounds right.

22 Q And you heard Mr. Murdica mention that he had  
23 actually attended that conference last fall, he  
24 testified to that on March 25th; right?

25 A I know that he was in Las Vegas, I'm not sure if

1 he attended the conference but he was there.

2 Q All right and the conference was October 10th  
3 to the 12th of last year, the last fall's version?

4 A That sounds about right, I don't recall --

5 Q And this is something that happens regularly;  
6 right, this conference?

7 A Yes, that would be an annual meeting.

8 Q And it's a conference where plaintiffs'  
9 lawyers come together to, from around the country, to  
10 talk about things like the Talc Litigation; right?

11 A Yes.

12 Q You pitched the Legacy proposal to other talk  
13 plaintiffs' lawyers at the Mass Torts Made Perfect  
14 Meeting last year; didn't you?

15 A No.

16 Q You discussed it with them?

17 A I may have had discussions about an option that  
18 would give J and J finality, yes.

19 Q Right, an option involving structural  
20 optimization and disaffiliation; correct?

21 A Yes.

22 Q Because you were trying to garner support for  
23 the proposal that you had been discussing with Mr.  
24 Conlon?

25 A No --



1 Q Was Mr. Conlon there, by the way, at Mass  
2 Torts Made Perfect last year?

3 A Not that I know of.

4 Q All right. Going back to the Hearing Exhibit  
5 4, you see that Mr. Conlon there offered that you, Doug  
6 Dachille and he were prepared to meet with J and J's  
7 Treasurer in person to share and discuss the terms of a  
8 matrix; right?

9 A Yes.

10 Q And that's a matrix that, I take it from your  
11 testimony, that you developed; right?

12 A Yes. I mean, I developed it along with the  
13 ovarian cancer negotiating group, yes.

14 Q And shared it with Mr. Conlon and Legacy;  
15 right?

16 A Yes.

17 Q And you know, at the end of the day, based  
18 upon an anticipated number of claimants and the values  
19 assigned to claims in a matrix, the math has to work if  
20 that matrix is going to be associated with a total  
21 dollar figure; right?

22 MR. POLLACK: Objection, vague.

23 THE COURT: Vague?

24 MR. POLLACK: Vague. I'm not sure what that  
25 means, the math has to work as to a total dollar

1 figure.

2 THE WITNESS: Well, obviously, if the total  
3 number of claimants that are submitted and are expected  
4 to receive compensation under that grid, if it exceeds  
5 the total amount of the acquisition by a significant  
6 number, then it wouldn't work, that is true.

7 BY MR. BRODY:

8 Q Right, right, so you can't put together a  
9 claims matrix where, you know, every claim is worth a  
10 million dollars, you have a hundred claims and you're  
11 funding it at \$10 million. You just can't do that;  
12 right?

13 A That's right, that's right.

14 Q All right. Mr. Conlon was, of course, being  
15 honest, I think as he testified, with his offer to have  
16 you come in. You were ready, willing and able to come  
17 in and talk about the claims matrix; right?

18 A I was.

19 Q In connection with the proposal Mr. Conlon  
20 was making to Johnson and Johnson for structural  
21 optimization and disaffiliation; right?

22 A Yes.

23 Q You had been actually in discussions with Mr.  
24 Conlon for months at that point; right?

25 A If you look at the time of our first discussion,

1 our first discussion as in the first time I ever met  
2 him, it was in May, May 2nd. So it had been months,  
3 true, it had been months between May and October.

4 Q Yeah, five and a half months?

5 A Yeah.

6 Q The day that e-mail was sent was the day  
7 after Johnson and Johnson's third quarter earnings  
8 call. You're aware of that; right?

9 A I'm aware that Mr. Haas made statements on October  
10 the 17th and I can see the date of this letter on  
11 October the 18th, yes.

12 Q Right and you knew -- I mean, you certainly  
13 knew that what was being proposed through Legacy was  
14 not what Mr. Haas had announced on the earnings call as  
15 any part of the company's preferred course, through the  
16 bankruptcy process; right?

17 A Is the Legacy proposal a bankruptcy proposal? No,  
18 it's not and what we had understood was that J and J  
19 was looking for finality. But we're -- and that was  
20 what we were making this proposal for. I mean, that's  
21 why I agreed to submit a matrix and that's why I, you  
22 know, offered to have Legacy considered as part of a  
23 mediation, as part of a bankruptcy toggle plan.

24 Because this was a -- this would be a way that J  
25 and J could have gotten finality without -- without

1 having a coercive bankruptcy plan in place. This would  
2 be -- this matrix, this proposal would be an opt-in  
3 proposal. So the claimants and their counsel would  
4 look at the settlement grid, they would look at the  
5 terms of that grid and they would choose, do we want to  
6 voluntarily participate or not?

7 Q The proposal that was being made by Mr.  
8 Conlon and that this settlement matrix was attached to  
9 was not a bankruptcy proposal, it was a tort system  
10 proposal; wasn't it?

11 A Yes.

12 Q And the -- did -- I assume Mr. Conlon had --  
13 had told you that J and J had told him that it did not  
14 believe the deal that he was proposing would actually  
15 provide finality?

16 A No.

17 Q You -- did you miss that part of his  
18 testimony from April 10th?

19 A You're asking me if he told me that, that --  
20 you're asking me if Mr. Conlon --

21 Q I'm asking you if you -- let me ask you this.  
22 Did you know that before April 10th of this year?

23 A That J and J had told Mr. Conlon that the Legacy  
24 option would not give them finality?

25 Q That's right.

1 A Okay, no.

2 Q Let's take a look at Hearing Exhibit 7.

3 A I'm there.

4 Q So this is the more detailed letter from Mr.  
5 Conlon that actually attaches the settlement matrix;  
6 right?

7 A Yes.

8 Q And that's the settlement matrix that you  
9 were prepared to come in and talk about with J and J,  
10 jointly with Mr. Conlon and Mr. Dachille; right?

11 A I would have been talking about the matrix. I  
12 would have gone in with Mr. Conlon and Mr. Dachille if  
13 J and J had made that invitation, yes.

14 Q And this letter includes a \$19 billion total  
15 price tag that is associated with a tort system  
16 resolution that tacks on your matrix; right?

17 A Yes, I see -- I see that it is a -- it has a \$19  
18 billion number or such greater number as the  
19 accountants, Price Waterhouse, would determine if it's  
20 necessary to clear the non-cash charge --

21 Q And he indicated that, "The proposal had been  
22 reviewed and was supported by leadership counsel on  
23 both the Federal M.D.L. and in State Court cases across  
24 the country." Do you see that, it's on page 1? The  
25 paragraph starts, "Put simply?"

1 A Yes.

2 Q And that was true; right?

3 A I had not seen -- I had not seen this proposal but  
4 I had what we -- what I had discussed with him was that  
5 we would support a Legacy option being presented to J  
6 and J. It is -- this is -- this would be an offer that  
7 J and J would have to accept.

8 If J and J were to accept, you know, this option,  
9 then I would support -- I would support a settlement  
10 agreement that incorporates this matrix that is  
11 attached as Exhibit A.

12 Q And you knew that -- I mean, I certainly  
13 expect you knew that it was supported not just by you  
14 but that you had talked about it with other plaintiffs'  
15 counsel; fair?

16 A I have -- I knew that this would be supported  
17 because for four years, every day, every day, I have  
18 been working toward a resolution. So I talked to  
19 plaintiffs' lawyers about various options and I have a  
20 high level of confidence that based upon not only my  
21 work but the -- all of the members of the Executive  
22 Committee, all of the members of the T.C.C. on the  
23 ovarian cancer side, we have been working on this  
24 intensely for a long time. So I knew that it would be  
25 supported.

1 Q And so Mr. Conlon was telling the truth when  
2 he wrote to J and J's Board that Legacy's proposal has  
3 been reviewed and is supported by leadership counsel on  
4 both the Federal M.D.L. and in State Court cases across  
5 the country; right?

6 A I had not reviewed this proposal, I had not seen  
7 this letter or this proposal as it is written. I had  
8 not seen that until you filed it but -- but I did -- I  
9 did provide, I did provide the matrix and I did -- I  
10 did say that I would support that. And we have  
11 leadership roles in both the M.D.L. and in State Court,  
12 in State Court litigations across the country.

13 Q And you -- you were on board with the  
14 statement that we saw from Mr. Conlon on October 18th  
15 that lead counsel for the ovarian cancer claimants,  
16 including Andy Birchfield, for an M.D.L. opt-in  
17 settlement matrix with Legacy would be expected to  
18 garner a 95 percent opt-in of current ovarian cancer  
19 claimants; right?

20 A Yes, I told him that.

21 Q Yeah, that was going to be my next question.  
22 That's what you told him; correct?

23 A Yeah.

24 Q All right. You are familiar -- by the way,  
25 at the same time all this was going on, you publically

1 advocated for Mr. Conlon's proposal; right?

2 A So that may be -- that may be a bit of a stretch.

3 I mean, he did -- he did publish the structural

4 optimization and in an op-ed piece. And I did, I did

5 issue a press release that said, I think that this is

6 -- this would be a win-win because it would give -- at

7 that point, at that point I thought that J and J truly

8 was looking for a way to get finality and that would be

9 a win for J and J but the plaintiffs were also looking

10 for fair and reasonable compensation, you know, and --

11 and the right to choose and not a coercive plan.

12 Q So you know, you referred to a press release

13 that you issued and to a piece that Mr. Conlon had

14 written. And we have -- and we looked at it with Mr.

15 Conlon, the piece that he wrote is in your binder as

16 Hearing Exhibit 15. If you could just verify that's

17 what you were referring to?

18 A Yes.

19 Q And that was the one that was titled, "Time

20 to Ditch the Texas Two-Step for a New Mass Tort

21 Strategy," right?

22 A Yes.

23 Q And if you turn to Hearing Exhibit 18, you

24 express support for Mr. Conlon's article the very same

25 day; right?



1 A That's true.

2 Q And your press release was titled, "Key  
3 Lawyer in Johnson and Johnson Talc Litigation Supports  
4 Call to Rethink Legal Strategies in Light of Failure of  
5 Texas Two-Step," right?

6 A Yes.

7 Q And it indicates, "Leading Mass Tort Lawyer  
8 Andy Birchfield," that's you?

9 A Yes.

10 Q "Of the Beasley Allen Law Firm is expressing  
11 strong support for a thought provoking article in  
12 Bloomberg Law authored by James Conlon, a seasoned  
13 expert in Corporate Restructuring and the former Global  
14 Practice Leader of Sidley Austin's World-Wide  
15 Restructuring Practice," right?

16 A Yes.

17 Q You didn't disclose that Mr. Conlon had  
18 represented J and J in the Talc Litigation; did you?

19 MR. POLLACK: Objection, argumentative.

20 THE COURT: I don't find that argumentative,  
21 I'm going to allow it. Please answer the question, Mr.  
22 Birchfield.

23 THE WITNESS: I did not say -- I didn't say  
24 anything about him working at Faegre. This was the  
25 main point was the structural optimization and

1 disaffiliation, which he had developed while he was at  
2 Sidley Austin. At this point, you know, the only thing  
3 I knew about --

4 BY MR. BRODY:

5 Q That's fine, you've -- no, you've, that's --  
6 and I think you indicated, you didn't refer to the fact  
7 that he had been in Faegre Drinker; did you?

8 A I did not.

9 Q All right. You didn't disclose the fact that  
10 you had been -- you know, you had met him and been  
11 working with him for six months to the day, at this  
12 point; right?

13 A At this point, I had met him six months prior.

14 Q Right and just two weeks before this, he had  
15 offered that he and you and Mr. Dachille would go into  
16 J and J to pitch this idea?

17 A Yes, on October the 18th, the letter you just  
18 showed.

19 Q And somebody reading your press release would  
20 know none of that; correct?

21 A I mean, somebody reading this -- I mean, there's  
22 nothing said about -- about an offer to meet with J and  
23 J, that's true.

24 Q You knew, however at the time that you wrote  
25 this, that this was the Texas -- the structural

1 optimization and a resolution through the tort system  
2 that was being pitched was adverse to J and J's  
3 preferred resolution for the bankruptcy process which  
4 had been announced by Mr. Haas on October 17th, just a  
5 couple weeks before; right?

6 A I have -- I mean, Mr. Haas has made clear that his  
7 preference is bankruptcy, period.

8 Q All right, so what both you and Mr. Conlon  
9 advocated in your dual November 2nd public statements  
10 was adverse to what J and J wanted; right?

11 A I didn't know that. I thought J and J wanted  
12 finality. I knew that Mr. Haas, you know, preferred  
13 bankruptcy. You know, what I had learned through all  
14 of this process, through two mediations, an estimation  
15 process, I had learned that J and J, I had heard over  
16 and over again; J and J is looking for finality. They  
17 believed that finality could only be achieved through  
18 bankruptcy. That was --

19 Q And you were advocating something else?

20 A I was looking for, I was looking for a way to give  
21 J and J what it said it wanted and getting our clients  
22 what we believe they deserve and that's why, when Mr.  
23 Conlon presented a path that would offer finality to a  
24 company that had been done and I had come to see that,  
25 that had viability. So -- so I've submitted a matrix

1 that would be part of that proposal, to see if that  
2 proposal would be acceptable to J and J.

3 Q And what you said is the plaintiffs' lawyers  
4 shared Mr. Conlon's vision of what you called a win-win  
5 solution, where claimants can pursue their claims in  
6 the tort system; right?

7 A Yes.

8 Q It would certainly be a win for you; right?

9 A A win for me is a win for our clients, period.

10 Q With a tort system resolution and your firm's  
11 position on the M.D.L. P.S.C., you stand to get money  
12 from the common benefit fund in the M.D.L., if there's  
13 a tort system resolution; correct?

14 A That would be up to -- that would be up to the  
15 Court, that would be up to the M.D.L. Court but it is  
16 also true that common benefit, you know, funds are  
17 available in bankruptcy proceedings too.

18 Q Not in the J and J bankruptcy proposal;  
19 correct?

20 A I haven't seen the T.D.P., you know, for the  
21 (indiscernible) but I'm sure that's the case, based on  
22 everything that I have heard so far.

23 Q So you're opposed to it and you're not  
24 familiar with the terms of it?

25 A Oh, I'm familiar with the terms enough to know

1 what the claimants would get or possibly could get. I  
2 know the upper limits of what the claimants could get  
3 under the J and J proposal. Because I know, it states  
4 in there, in their proposal and in what they have  
5 rolled out, what the total amount would be and I know  
6 what the -- I have a very good idea of what the total  
7 number of claimants are. So I know it falls far short  
8 of what claimants would be -- would be a reasonable and  
9 fair settlement for claimants.

10 Q With all due respect, Mr. Birchfield, I don't  
11 think you answered my question and my question was  
12 simply -- let me -- I'll rephrase it so I can be sure  
13 we're on the same page. Are you so unfamiliar with the  
14 terms of the bankruptcy proposal that you were  
15 proposing and seeking to dismiss that you're not aware  
16 of whether money from that proposal would go into the  
17 M.D.L. common benefit fund or not?

18 A I know the terms that J and J put forward in their  
19 proposal and that proposal did not provide for common  
20 benefit fees.

21 Q Right and you are also generally familiar  
22 with the terms of the M.D.L. order establishing the  
23 common benefit fund; aren't you?

24 A I am.

25 Q And pursuant to the common benefit order that

1 Judge Wolfson entered in the Federal M.D.L., up to 12  
2 percent, 10 percent fee and 2 percent cost, of any  
3 amount recovered on talc claims in the M.D.L. is  
4 assigned to a common benefit fund; correct?

5 A No, up to 10 percent fees and up to 2 percent cost  
6 could be. That's --

7 Q And that's exactly what I said; right?

8 A I'm not so sure. There are other provisions, so  
9 it's not a -- it's not determined. This is an order  
10 that is entered to provide hold-backs on an interim  
11 basis. At the end of the day, the Court, the Article 3  
12 Judge, would make that determination about what the  
13 appropriate amount is.

14 Q Your general understanding, though, just so  
15 we're clear, I don't think this is that complicated.  
16 Is that, the range of these that could be contributed  
17 to the common benefit fund is anywhere from 8 percent  
18 to 12 percent of the gross recovery amount, depending  
19 upon whether or not the individual firms were early  
20 participants or not; right?

21 A It would be 6 percent fees to 10 percent fees and  
22 2 percent costs.

23 Q For a total of 8 to 12 percent; correct?

24 A Yes.

25 Q All right.

1 A Not fees but fees and costs.

2 Q And that -- separate and apart from that 8 to  
3 12 percent, the fees that you, Beasley Allen, otherwise  
4 charge your talc clients is a 40 percent contingency  
5 fee; correct?

6 A It's not truly separate and apart because the  
7 common benefit fees -- the common benefit fees are  
8 deducted from the contingency fees.

9 Q All right, so let's just talk about the  
10 common benefit fees, okay?

11 A Okay.

12 Q When we're talking about 8 to 12 percent --  
13 MR. POLLACK: Your Honor, I'm going to  
14 object.

15 THE COURT: Sure.

16 MR. POLLACK: We're here on R.P.C. 1.6, 1.10.  
17 We had --

18 THE COURT: You have a relevancy question,  
19 right?

20 MR. POLLACK: We had this whole discussion up  
21 front --

22 THE COURT: I don't mean to cut you off, Mr.  
23 Pollack.

24 MR. POLLACK: Yep.

25 THE COURT: But how is this relevant with

1 regard to the conflict, alleged conflict with Mr.  
2 Conlon?

3 MR. BRODY: It's relevant to the motivations  
4 for Mr. Birchfield to -- you know, in violation with  
5 the ethical rules, align himself with Mr. Conlon,  
6 without paying mind of the ethical rules, without  
7 disclosing to J and J that he was working with its  
8 former outside counsel from Faegre Drinker.

9 All of it goes to why it is and frankly, it  
10 goes to credibility, as well. Why it is that Mr.  
11 Birchfield would so recklessly align himself with one  
12 of J and J's former outside lawyers on the very same  
13 matter.

14 MR. POLLACK: There's no proffer that Mr.  
15 Conlon and Mr. Birchfield are sharing fees. There's no  
16 proffer that there's an agreement between Mr.  
17 Birchfield and Mr. Conlon to share fees. What this is  
18 has nothing to do, zero to do, with what's before you.  
19 This is Mr. Haas' effort to try to get a sound byte in  
20 the national press so he can attack Beasley Allen on a  
21 different matter, outside this courtroom, which is that  
22 they're greedy buggers who are simply trying to make  
23 money.

24 That's his argument and it's a wonderful  
25 argument and he has a great argument in response. I'm



1 not, I'm trying to get a fair and reasonable  
2 compensation for my clients and he'll have the  
3 opportunity to answer that.

4 But respectfully, Your Honor, this is -- if  
5 we're going to try the Beasley Allen Law Firm, then we  
6 ought to get all the facts up here, let's just go do  
7 it. But if we're here to try an ethics issue, as a  
8 basis for disqualification, this is so far remote, so  
9 prejudicial, we should cut it off right now.

10 THE COURT: I don't know if it's prejudicial,  
11 I don't know if it's remote. I think there's some  
12 relevancy, Mr. Brody. Candidly, we understand the  
13 Court can take judicial notice of the common benefit  
14 fund, you know, we all know that. We know that  
15 plaintiffs' attorneys have a percentage that is built  
16 into any recovery but let's get it back focused to  
17 whether Mr. Conlon or not --

18 MR. BRODY: Sure.

19 THE COURT: -- has shared confidential J and  
20 J. So you know, to the extent J and J is trying to  
21 suggest there's motivation here or not, I think it gets  
22 a little bit remote with regard to relevancy of why  
23 we're here. So I don't know if you want to adjust your  
24 questions, fine tune your questions but I don't think  
25 --

1 MR. BRODY: Let me --

2 THE COURT: I don't think that's really on  
3 point with why we're here.

4 MR. BRODY: I think I can wrap this line of  
5 questions up --

6 THE COURT: Okay.

7 MR. BRODY: -- with two, just two simple  
8 questions.

9 THE COURT: It's clear, I don't think there's  
10 any secret here. J and J wanted something, X.  
11 Plaintiff, including Mr. Birchfield, wanted Y. To the  
12 extent there's a difference of opinion, the Courts  
13 accept that. You know but really, we want to get back  
14 to where's Mr. Conlon and then the issue before this  
15 Court.

16 BY MR. BRODY:

17 Q And happy to -- actually, I can wrap it up  
18 with a single question. Just in terms of the common  
19 benefit fund, Mr. Birchfield, the difference in terms  
20 of amounts that would come into the common benefit  
21 fund, an \$8.9 billion resolution. I mean, if an \$8.9  
22 billion resolution in the tort system and the money is  
23 going into the common benefit fund, 12 percent of that  
24 is more than a billion dollars; right?

25 A Are you asking me to do the math? I mean, are you

1 asking me if your math is correct?

2 Q Yes.

3 THE COURT: Do you need a calculator?

4 THE WITNESS: I think -- maybe so. The --

5 MR. POLLACK: Can we take judicial notice?

6 Whatever the math is --

7 THE COURT: It's a lot of money, it's a lot  
8 of money.

9 BY MR. BRODY:

10 Q All right and if you go to 19 billion, it's  
11 double, plus; right?

12 A Yeah, that's typically not the way that common  
13 benefit funds work. You know, typically, what courts  
14 have done over decades with common benefit is that the  
15 larger -- you know, the larger the recovery, depending  
16 on the load star and the amount of hours that are put  
17 in, you know, the percentage would be reduced. But if  
18 you're asking me if the math, if 12 percent of 8.9 is  
19 less than 12 percent of 19 billion, the answer is yes.

20 THE COURT: And let me just address. You  
21 know, obviously, that focuses on the M.D.L. and any  
22 award by the District Court Judge. So that's  
23 prognostic here. There's been no determination and I  
24 will have Judge Singh, if Judge Singh would like to  
25 address that. Go ahead on that, please.

1 JUDGE SINGH: Just to be abundantly clear.

2 To the extent there's any proffer of what would be  
3 recoverable under the common benefit order entered in  
4 the M.D.L., the Court is not making any preliminary  
5 findings as to what may or may not be awarded on the  
6 back end.

7 I do understand and appreciate some of these  
8 points were raised in the parties' briefing on the  
9 application, at least in Federal Court, as to the  
10 potential import of the common benefit order. The  
11 Court will consider those arguments or not consider it,  
12 as appropriate, based off of the applicable standard.

13 Notwithstanding, I also recognize that there  
14 is the request in the Federal Court application for the  
15 alternative relief, as applicable to the Plaintiff  
16 Steering Committee. To the extent this may or may not  
17 be relevant to that alternative relief, it will be  
18 addressed by the Court.

19 MR. BRODY: Thank you, Your Honor.

20 BY MR. BRODY:

21 Q Mr. Birchfield, you know who the attorney  
22 Allen Smith is; right?

23 A I do.

24 Q And you have a co-counsel relationship with  
25 the Allen Smith Law Firm; right?

1 A Yes.

2 Q As a general matter, speaking -- not limited  
3 to Allen Smith at this point, the majority of your talc  
4 claims are obtained or referred to you through co-  
5 counsel relationships; right?

6 A Yes. I mean, the vast majority of the claims  
7 where we represent claimants, we have co-counsel  
8 agreements.

9 Q Among them, Allen Smith has a litigation  
10 financing arrangement; correct?

11 A I understand that Allen Smith and probably a  
12 number of the co-counsel would have litigation funding  
13 agreements.

14 Q And at some point, I believe Fortress was  
15 financing some of the Allen Smith claims?

16 MR. POLLACK: Objection, Your Honor,  
17 relevance as to what Allen Smith is doing regarding a  
18 litigation funding matter where the question is, did  
19 Jim Conlon share confidential information with Beasley  
20 Allen? So we're asking for hearsay as to the  
21 relationship regarding whatever this funding group is,  
22 what discussions they had, we don't have the terms  
23 sheets and conditions here and we are far afield on  
24 relevancy because there's been no proof that litigation  
25 funding is relevant to Mr. Birchfield's decisions. So

1 I object to this unrelevance.

2 THE COURT: Thank you, Mr. Brody?

3 MR. BRODY: It goes to the same point, Your  
4 Honor, and these are just three preliminary questions  
5 and I have about four more questions after that on this  
6 issue but it goes to -- it goes to the -- you know,  
7 what is driving Mr. Birchfield and what drove Mr.  
8 Birchfield --

9 THE COURT: Allegedly.

10 MR. BRODY: -- to take advantage of the --

11 THE COURT: We've made no findings.

12 MR. BRODY: Right but to join forces with Mr.  
13 Conlon over a period of over six months last year, to  
14 engage in strategies that he knew and Mr. Conlon knew  
15 were adverse to what J and J preferred.

16 THE COURT: I sustain the objection with  
17 regard to the litigation funding agreements.

18 MR. BRODY: Fair enough.

19 THE COURT: On relevance.

20 BY MR. BRODY:

21 Q Fair enough. So Mr. Birchfield, the -- your  
22 position is that -- first of all, you couldn't have  
23 hired Jim Conlon to be a lawyer at Beasley Allen to  
24 work on the talc cases; right?

25 A Never made -- never made any effort to hire him.

1 I mean, that's the whole point, he came to us as a  
2 vendor.

3 Q But you -- but you couldn't have done that;  
4 right?

5 A Would not have done that because if we were going  
6 to hire him, we would have found out more about his  
7 involvement, the length of his work and at that point,  
8 we would not have hired him.

9 Q I'm kind of struggling with your answer. Are  
10 you telling me, you think there might be a circumstance  
11 where it would be okay to hire somebody who had been  
12 outside counsel for your opponent to work on the same  
13 matter as a lawyer?

14 A Not without a waiver.

15 Q Excuse me?

16 A Not with a -- no, I would not.

17 Q All right.

18 A What I was saying is, you know, that what has come  
19 out in this courtroom was much different than anything  
20 I ever knew because Jim Conlon was working behind the  
21 scenes. The only thing that I knew was what Jim  
22 Murdica had told me and that was that he had worked  
23 with an F.C.R. on a proposal that Jim Murdica and I  
24 were working together to try to get the Imerys T.C.C.  
25 to sign off on.

1 Q And we've covered that, I don't want to go  
2 back to that but you acknowledge, no matter what his  
3 role was, if he's outside counsel for J and J on the  
4 Talc Litigation, you can't hire him as a lawyer at  
5 Beasley Allen to work on the Talc Litigation; right?

6 A Agreed.

7 MR. POLLACK: Objection, asked and answered.

8 THE WITNESS: Agree.

9 MR. BRODY: All right and you --

10 THE COURT: I'll permit the question but go  
11 ahead.

12 BY MR. BRODY:

13 Q And you can't hire him as an expert witness;  
14 right?

15 A I would not hire him as an expert witness, no.

16 Q Right but you couldn't, the ethical rules  
17 would prohibit you from doing that; right?

18 A Right.

19 Q Right but just your position is, entering  
20 into a relationship with him as C.E.O. of Legacy to  
21 design a resolution of the Talc Litigation was just  
22 fine; right?

23 MR. POLLACK: Objection.

24 THE WITNESS: This proposal, it would --

25 THE COURT: Hold on.



1 MR. POLLACK: Design a resolution because  
2 that -- we're going to see this in briefs, I promise  
3 you, for months to come --

4 THE COURT: Suggests facts that are not in --

5 MR. POLLACK: Exactly.

6 THE COURT: Okay.

7 MR. BRODY: I mean, he can answer the  
8 question. It's simply a --

9 THE COURT: I think it's more of a  
10 hypothetical than a factual question. Why don't you  
11 rephrase your question, Mr. Brody.

12 MR. BRODY: Sure.

13 BY MR. BRODY:

14 Q Your position is that the work you did with  
15 Mr. Conlon as C.E.O. of Legacy is just fine; right?

16 A I didn't get any confidential information from Mr.  
17 Conlon. What would happen, understanding the nature of  
18 this proposal, makes that crystal clear. Because for  
19 this proposal to go anywhere, it has to be acceptable  
20 to J and J. They can do it without my participation  
21 and that was a big concern but if the proposal were  
22 accepted, then Legacy is standing in the shoes of J and  
23 J.

24 They are our adversary, every -- every bit as much  
25 as J and J is now. They have all the talc liability,

1       that's the nature of it. So I went into these  
2       discussions knowing that.

3               MR. BRODY: And --

4               THE COURT: Let me ask a question, Mr. Brody,  
5       Pollock.

6               MR. BRODY: Yes, of course.

7       BY THE COURT:

8               Q       Mr. Birchfield, you said you didn't get any  
9       confidential information from Conlon regarding J and J,  
10      that was your last testimony; right?

11      A       Yeah.

12              Q       So to the extent, you know you didn't get any  
13      confidential information. So Mr. Conlon didn't say,  
14      hey by the way Mr. Birchfield, I have this information  
15      regarding J and J. He never came to you in that  
16      regard; right?

17      A       Right.

18              Q       But he -- he could have told you information  
19      that he got from J and J. I mean, you're not  
20      discounting that; am I right? You wouldn't know that.

21      A       I wouldn't.

22              Q       You wouldn't know. If he came to you and  
23      said, Mr. Birchfield and I'm referring to you as Mr.  
24      Birchfield.

25      A       Yes.

1 Q If you do X, Y and Z, why don't you consider  
2 that and convey that to the Plaintiffs Committee. To  
3 the extent that he got that information from J and J  
4 but didn't tell you that, you wouldn't know that;  
5 right? I'm not trying to set you up, I --

6 A Right.

7 Q Unless he said, hey Mr. Birchfield, listen to  
8 what J and J is doing and here's what they're thinking.  
9 I worked there for 22 months, here's the information I  
10 got, X, Y and Z. He could have just came to you and  
11 said, Mr. Birchfield, why don't you propose X, Y and Z  
12 to your clients and the Plaintiffs Committee?

13 A He did not, he did not do that. The discussion,  
14 all the discussions you know with Mr. Conlon were --  
15 and the other Legacy people were focused on this  
16 proposal of structural optimization and disaffiliation.

17 And so we didn't -- that proposal, we didn't need  
18 any information from them except as to how structural  
19 optimization and disaffiliation would work. And  
20 frankly, you know, our big concern was, what are the  
21 traps? Are there minefields here that we must -- that  
22 we must avoid? Legacy --

23 Q And money drives -- and money drives any  
24 settlement, right? So you have 8.9 million, you have  
25 19 million. So to the extent any plan would work, it's

1 fund driven?

2 A It is fund driven, absolutely. The focus from our  
3 perspective was, what would give our clients reasonable  
4 compensation, period? If we put together a structure,  
5 if we put together a structure and a settlement fund  
6 that would provide our clients with reasonable  
7 compensation.

8 Common benefit will take care of itself, other  
9 issues will take care of itself. That was the goal,  
10 that was the driver, to get a resolution plan that  
11 would be acceptable to J and J and that's where the  
12 finality came in.

13 THE COURT: Thank you, Mr. Birchfield. Judge  
14 Singh?

15 JUDGE SINGH: No follow-up.

16 THE COURT: Thank you. I didn't mean to side  
17 track but I wanted to follow up with regard to that  
18 question.

19 MR. BRODY: That's quite all right, quite all  
20 right and Mr. Birchfield, you would agree with me --

21 THE COURT: Hold on, Mr. Placitella has  
22 something from --

23 MR. PLACITELLA: No, someone just sent me a  
24 note that they can hear Mr. Haas' questions or  
25 information being provided to Mr. Brody over the -- I

1 just wanted to let everybody know.

2 MR. HAAS: Your Honor -- thank you, thank  
3 you, thank you, Chris. Your Honor --

4 THE COURT: Thank you, Mr. Placitella and  
5 that is probably the case with regard to that  
6 transponder that's in front of you, Mr. Haas.

7 MR. HAAS: Thank you very much, Your Honor,  
8 but I am completely confident that anything I said to  
9 my Counsel, I have no problem sharing the word.

10 THE COURT: Okay.

11 MR. HAAS: As of this point, in the  
12 courtroom, so it's okay.

13 THE COURT: So keep that in mind. You also  
14 have, with your microphones, there's a mute button so  
15 that we can't hear. And you can also, I'm going to  
16 tell you, Mr. Pollack and Mr. Brody, the green light,  
17 if you touch it, it becomes a red light. So, thank  
18 you, sir.

19 MR. PLACITELLA: Sorry, I didn't mean to  
20 (indiscernible)

21 THE COURT: That's quite all right. I think  
22 that's important to know, everybody needs to know. Go  
23 ahead, Mr. Brody.

24 BY MR. BRODY:

25 Q Yeah, definitely good to know, thank you. It

A. Birchfield - Cross

70

1 would certainly help if you were trying to come up with  
2 a number that J and J would agree to, to have somebody  
3 who had been on the inside, wouldn't it?

4 MR. POLLACK: Objection, speculative,  
5 hypothetical.

6 THE WITNESS: Not at --

7 THE COURT: No, I disagree, objection  
8 overruled. To the extent that Mr. Birchfield  
9 understands the question and can not speculate.

10 THE WITNESS: Okay, not at that point in  
11 time. I mean, at that point in time or the time I  
12 first ever met Jim Conlon, we had been negotiating,  
13 started negotiations, started negotiations with Mr.  
14 Murdica in April of 2020 and I had been focused on --  
15 BY MR. BRODY:

16 Q I'm sorry, my question -- my question was  
17 just, if you wanted to come up with a number that J and  
18 J would agree to, it help to have someone who had been  
19 on the inside; wouldn't it?

20 A No.

21 MR. POLLACK: Your Honors, I understand Mr.  
22 Brody wants a yes or no. Mr. Birchfield is explaining  
23 that he already knows all this stuff anyway. If he's  
24 going to ask that question, I respectfully beg you, let  
25 my client answer the question because Mr. Brody can't

1 just do it the way he wants to do it because he wants  
2 to shorten it, that's not the answer. We're here to  
3 get the truth. I respectfully beg that Mr. Birchfield  
4 be able to give his response.

5 THE COURT: Thank you. You were responding  
6 to that question but with regard to -- more directly,  
7 though, Mr. Birchfield?

8 THE WITNESS: At that point in time, we had a  
9 very good idea of what J and J would willingly pay  
10 under those circumstances. They put it on the table.  
11 They had done that through the \$8.9 billion proposal  
12 that they had rolled out. That was after a year long,  
13 a year long mediation.

14 So no, what we were looking for was a way --  
15 because the whole idea was that J and J needed  
16 finality, they needed finality. We saw the bankruptcy  
17 plan. The bankruptcy plan would not pay, would not pay  
18 reasonable compensation to our clients and so we were  
19 looking for a way to give J and J the finality so we  
20 could get.

21 BY MR. BRODY:

22 Q So I take it that, that's a no, you disagree,  
23 it wouldn't be helpful to have somebody who had been on  
24 the inside if you wanted to come up with a number that  
25 J and J would agree to. And so you just tossed 19

1 billion out there, when you know that J and J proposed  
2 8.9?

3 A I did not toss out the 19 billion. The 19 billion  
4 number is Jim Conlon and Legacy's number and that is a  
5 -- that's what he testified to. He testified as to how  
6 he got to that number and that would be for all talc  
7 liability, for all time.

8 Taking on all of J and J's talc liability. That  
9 was not the number -- that's not a number for the  
10 ovarian cancer claims. The ovarian cancer claims were  
11 a piece of that overall proposal but only a piece.

12 Q And you don't know whether that number is  
13 based on confidential discussions he had with J and J;  
14 do you?

15 A He testified that it is not and --

16 Q Well, he testified to a lot of things. You  
17 don't know; do you?

18 A If you're suggesting that J and J had told them  
19 internally that that's the number, then I would find  
20 that surprising but I don't have any way of knowing.

21 Q All right, fair enough, let's wrap this up.  
22 You know that on Wednesday morning, J and J announced a  
23 proposed plan of reorganization by L.T.L. Management,  
24 L.L.C., for the comprehensive and final resolution of  
25 all claims and future claims related to ovarian cancer,



1 arising from cosmetic talc litigation, against it and  
2 its affiliates in the United States; right?

3 A Yes.

4 Q And you know that the announced plan provides  
5 for a three month solicitation period during which  
6 ovarian claimants are informed of its terms and will  
7 have the opportunity to vote for or against the plan;  
8 right?

9 A I understand that that's a provision of the  
10 proposal.

11 Q And that was announced Wednesday morning;  
12 right?

13 A Yes.

14 Q And by 8:26 a.m. on Wednesday morning, the  
15 same day, you had issued a press release stating your  
16 opposition to it; right?

17 A Yes.

18 Q And you probably remember this but I'm  
19 quoting what was attributed to you in that press  
20 release. "We believe any bankruptcy based on this  
21 solicitation and vote will be found fraudulent and  
22 filed in bad faith under the bankruptcy code. On  
23 behalf of our clients who deserve better, we are  
24 blowing the whistle on this cynical legal tactic and  
25 we'll resist it at every turn." That was your

1 statement; right?

2 A Yes.

3 Q And Ms. O'Dell also made a statement in  
4 opposition; correct?

5 A Yes.

6 Q And she was quoted as saying, "The company is  
7 afraid of a legitimate vote among those who are truly  
8 sick and the families of the deceased who have been  
9 battling J and J's obstruction and bad faith for years  
10 and who are supported by numerous scientific studies  
11 showing that talc contains asbestos and other known  
12 cancer causing ingredients." That's what Ms. O'Dell  
13 stated; right?

14 A Yes.

15 Q So you're both out in the media resisting J  
16 and J's latest plan to resolve its talc liabilities;  
17 right?

18 A Yes.

19 Q You even sent an open letter to the legal  
20 community on the same day; right?

21 A That's right.

22 Q And you did that under the Mass Torts Made  
23 Perfect Organization logo; didn't you?

24 A It was a joint letter with Mike Pappentonio  
25 (phonetic).

1           Q     And you don't just want, as you stated there,  
2     you don't merely want to challenge J and J's proposed  
3     resolution as filed in bad faith, although frankly  
4     nothing has been filed, as you indicated but you also  
5     want to try to galvanize claimant opposition to J and  
6     J's plan; right?

7     A     Yes.

8           Q     And you're urging people to be united in  
9     opposition to the J and J plan; right?

10    A     Yes.

11          Q     So I mean really, nothing has changed since  
12     last summer when you were opposing the J and J LTL-2  
13     plan. You're still opposing the way in which J and J  
14     wants to resolve these claims; right?

15    A     Yeah --

16               MR. POLLACK: Objection, Your Honor, again  
17     relevance. What does the challenge to a plan today  
18     have to do with a question of disclosure a year ago? I  
19     don't see any connection.

20               MR. BRODY: He already answered my question  
21     yes and that was my last question.

22               THE WITNESS: No.

23               MR. POLLACK: Your Honor, I still object to  
24     it. I frankly, I don't know what -- Mr. Brody was  
25     going to be done in half an hour, now it's two hours.

1 At this rate, we'll be here all day.

2 THE COURT: I'm sustaining the objection.

3 MR. BRODY: That's fine, I have nothing  
4 further.

5 THE COURT: Thank you. Judge Singh, do you  
6 want to take a break or do you want to continue?

7 JUDGE SINGH: No, no -- yeah, I'm fine with  
8 the break (indiscernible)

9 THE COURT: Okay. May we take ten minutes,  
10 everyone?

11 MR. POLLACK: Fine, Your Honor, what time  
12 would you like to reconvene?

13 THE COURT: 25 after 11:00. I'm using that  
14 clock, I know we all haven't synchronized our watches  
15 but I'll start in ten minutes.

16 COURT OFFICER: All rise.

17 (Off the record at 11:13:00 p.m., back on the record at  
18 11:25:00 p.m.)

19 THE COURT: Thank you, please be seated. Mr.  
20 Birchfield, come on back. You're still under oath,  
21 sir.

22 THE WITNESS: Yes.

23 THE COURT: Mr. Pollack, we have some  
24 questions?

25 MR. POLLACK: I do, Your Honor, Honors, I

1 apologize.

2 THE COURT: Yep, we're going to wait for Mr.  
3 Brody, okay.

4 MR. POLLACK: Oh, it will be so much faster  
5 without him.

6 MR. BRODY: Apologies.

7 THE COURT: Quite all right. Just for the  
8 record, you were pretty close to our time in coming  
9 back but go ahead, Mr. Pollack.

10 MR. POLLACK: Yes, Your Honor.

11 REDIRECT EXAMINATION BY MR. POLLACK:

12 Q Mr. Birchfield, what I would like to do is  
13 start with the -- and Your Honor, this goes to the  
14 question of whether Mr. Conlon had significantly  
15 harmful information, you know, so that's what I'm  
16 focused on here. Mr. Birchfield, could you please walk  
17 me through what Beasley Allen first -- when did it  
18 first become involved in talc litigation against J and  
19 J?

20 A It began in 2013. In 2013, it was when we opened  
21 our first case and again, you know, investigating the  
22 talc issue with J and J.

23 Q And do you know what that first case was, by  
24 chance?

25 A I don't.

1 Q And do you know when they had their first  
2 verdict?

3 A Okay, so the first trial was in 2016, in February  
4 of 2016 and we had the Fox Trial, that was a \$72  
5 million verdict.

6 Q And is there another one called Ristesund, R-  
7 I-S-T-E-S-U-N-D, have you heard of that one?

8 A Ristesund, yes.

9 Q And when was that one, sir?

10 A So it was in 2016, as well. So in 2016, we had  
11 three verdicts, the \$72 million verdict, I believe a  
12 \$55 million verdict and a \$70 million verdict in 2016.

13 Q And was Leigh O'Dell ever appointed as co-  
14 lead of the M.D.L.?

15 A Yes, so --

16 Q When did that occur?

17 A That would have been in 2016, as well, I believe  
18 in December of 2016.

19 Q And I'm just going to skip a few, just for  
20 brevity, Your Honors. Slemp, there's a matter called  
21 Slemp; have you ever heard of that one?

22 A Yes.

23 Q What was Slemp?

24 A Slemp was an ovarian cancer trial and I believe  
25 that was \$110 million verdict.

1 Q And do you know approximately what year that  
2 was?

3 A I believe that was 2017. So in 2016, we had three  
4 verdicts, three favorable plaintiffs verdicts and then  
5 in the beginning of 2017, we had a Daniels case that  
6 was a defense verdict and then we had the Slemp trial,  
7 ovarian cancer trial, I believe that was \$110 million  
8 verdict.

9 And then those cases were -- those cases, the  
10 verdicts were vacated based on the Bristol-Myers Squibb  
11 case out of the Supreme Court. The verdicts were  
12 vacated on personal jurisdiction but those cases are --  
13 those cases are still ready to be retried. I'm sorry.

14 Q Were there any Daubert challenges or Ingum  
15 (indiscernible) challenges as to expert qualification  
16 during the course of these trials?

17 A Yes, I mean, every -- I mean every trial, you  
18 know, you would have -- maybe not Daubert. I mean, in  
19 preceding these trials, the Courts would weigh under  
20 the local state standard. So in New Jersey, it would  
21 be Kemp and in California, which is --

22 THE COURT: Accutane now.

23 THE WITNESS: Accutane, okay, all right.

24 THE COURT: Just for our record, Kemp,  
25 Accutane, Daubert.

1 THE WITNESS: Okay and then Sargon  
2 (phonetic), you know, there was in 2017. After the  
3 Slemp case, we helped try the El Shevoria (phonetic)  
4 case in California, there was a Sargon hearing there.

5 BY MR. POLLACK:

6 Q What's a Sargon hearing? I missed that one.

7 A It's the equivalent of the Accutane here but in  
8 California.

9 Q Oops, okay.

10 A The state court equivalent of the Daubert, you  
11 know, proceeding.

12 Q And could you describe for the Court the  
13 team, the Beasley Allen team that works on -- what's  
14 your role within the talc stuff that you do; what's  
15 your title?

16 A I'm the Section Head for the Mass Tort Section.  
17 Our firm is divided into sections and I head up our  
18 Mass Tort Section. And so we have a pretty large team,  
19 30-something lawyers, in the Mass Tort Section and in  
20 the staff, a large staff. So I manage, I supervise and  
21 you know, and since 2020, I have been hands on in the  
22 talc.

23 Before that, I was not the one that tried those  
24 cases. You know, so Ted Meadows tried and Gerry  
25 Beasley, our Senior Partner, tried the first Fox case



1 in 2016. But I mean, I was involved in learning the  
2 case, learning the details and supervising but I had  
3 other things, prior to April of 2020 and at that point,  
4 at that point, had my first meeting with Mr. Murdica,  
5 who testified here and at that point, we began pursuing  
6 resolution.

7 So we had a number of trials we had gone through.  
8 I'm sorry, I'll stop but we had gone through a number  
9 of trials up to that point. My role prior to April of  
10 2020 was more of a supervisory role within our section.

11 Q Did there come a point in time when you  
12 weren't just representing clients for Beasley Allen but  
13 you also had a leadership role among the Torts Bar at  
14 large?

15 A Yes, that would have been -- well, I mean,  
16 officially, we would have been in the M.D.L. So before  
17 2016, there was no M.D.L. formed. Once the M.D.L. was  
18 formed, you know, Judge Wolfson appointed Leigh O'Dell,  
19 my Law Partner, as Co-Lead, along with Michelle Parfitt  
20 from Ashcraft Gerel, she appointed the committee.

21 And so Leigh and Michelle's -- Ms. O'Dell and Ms.  
22 Parfitt, served as Co-Lead Counsel and so, we had a  
23 leadership role nationally, in that regard. There's  
24 coordinated litigation here in New Jersey and Ted  
25 Meadows and Mr. Placitella and Mr. Golomb were

1 instrumental there. I don't think there is an official  
2 order but just, just that role.

3 Q And do you view as -- as Chair of the  
4 Department, do you view your role because at the time,  
5 I think you mentioned 2016, that your role vis-a-vis  
6 the other plaintiffs' law firm, that you owe their  
7 clients a duty of loyalty too, that you're there to  
8 protect their joint interest?

9 A Yes, I mean, our view, our view and when I say our  
10 view, shared by Ms. O'Dell that it's our firm approach  
11 and there are differences in how firms would approach  
12 leadership roles and M.D.L.s. But my first M.D.L.  
13 leadership role was in Vioxx for you know, Judge Eldon  
14 Fallon and you know, in that -- it was instilled then,  
15 you have a duty to all of the claimants.

16 There are a number of times when leadership have  
17 resolved their own cases and that can be but you know,  
18 we would never abandon our role as leadership. We have  
19 a fiduciary duty, in my view, to all of the claimants  
20 that are pending in the M.D.L., the lawyers and the  
21 claimants.

22 Q I would like you to address to the Court what  
23 you learned, and I'm going to skip all the way up to  
24 2021. I'm going to go right up to this point right  
25 here when Mr. Conlon joins Faegre. So let's call it

1       sometime in 2020. I would like you to briefly describe  
2       what you learned and the premise, Your Honors, for my  
3       question is; what did Mr. Conlon know that he didn't  
4       already know?

5               That's really what I'm getting to, all right? So  
6       Andy, if you could walk through, what did you learn  
7       from 2013 to 2020 regarding the natures of the claims,  
8       the types of claims, value of claims, matrices, just go  
9       for it.

10              MR. BRODY: I'm going to --

11              THE COURT: I think Mr. Brody wants to  
12       address the Court, Mr. Pollack.

13              MR. BRODY: Well, first I'm going to object  
14       to the question that is calling for a narrative. It's,  
15       you know, what did you learn about -- I heard a list of  
16       six, seven, eight, nine things. I think the question  
17       should be more focused.

18              You know, generally, I'm all in favor of  
19       Counsel framing things for the Court when they are  
20       going to go into a certain area and ask questions but I  
21       think what we're hearing from Mr. Pollack is argument  
22       and I think that it's improper to offer argument during  
23       the examination of Mr. Birchfield. So I would object  
24       to the continued framing arguments.

25              MR. POLLACK: I can reframe it.

1 THE COURT: Could you rephrase the question?

2 MR. POLLACK: Of course.

3 THE COURT: Mr. Pollack, with regard to what  
4 you're exactly -- the testimony that you want to elicit  
5 from Mr. Birchfield?

6 BY MR. POLLACK:

7 Q Absolutely. Mr. Birchfield, the challenge  
8 here today is that you obtained information that was  
9 confidential to J and J and that you got it from Mr.  
10 Conlon. That is the allegation that has been brought  
11 against you. I would like to know, what did you know  
12 before regarding these claims, what did you know before  
13 you met Jim Conlon?

14 A Before I ever met Jim Conlon, we had extensive,  
15 extensive, you know, knowledge and understanding about  
16 the nature of these claims, as well as -- as well as  
17 what -- how J and J would evaluate these claims. We  
18 gained that because in my view, there -- you learn the  
19 strengths and the weaknesses of the cases through the  
20 trials. And so we had tried multiple, multiple trials  
21 before I ever met Jim Conlon.

22 Before I ever met Legacy, Jim Conlon or anyone at  
23 Legacy, we had gone through multiple Daubert-like  
24 hearings. We had gone through the M.D.L. in front of  
25 Judge Wolfson, I mean, that was extensive briefing and

1 expert reports and live testimony. And we had the --  
2 you know, we had the Daubert decision from Judge  
3 Wolfson. We're going through a similar type proceeding  
4 with Judge Nelson Johnson here, ending up on appeal to  
5 the Appellate Court.

6 And then beyond that, I mean, I've had extensive  
7 negotiations, you know, on behalf of ovarian cancer  
8 claimants, with Jim Murdica. So I had -- I believe, I  
9 believe the first matrix, you know, that I provided to  
10 J and J for Jim Murdica, I believe that was as early as  
11 May of 2020. And so you know, we had been evaluating,  
12 you know, how can -- how can we put together a  
13 structure for global resolution?

14 We had been working on that for a long time and a  
15 long time before ever met, you know, anyone, Jim Conlon  
16 or anyone from Legacy. You know, we negotiated, we  
17 negotiated toward a private -- when I say private, it  
18 would be through a global deal for all claimants but  
19 not part of any bankruptcy. We did that and then there  
20 was a proposal that was a bolt-on to the Imerys  
21 bankruptcy and so we had negotiated all of that.

22 All of that requires, you know, an in-depth  
23 understanding of the nature of the claims. What are  
24 truly compensable claims, what are the claims that are  
25 supported by the science and the medicine and what's

1 not. It also requires an understanding of how many  
2 claims. What is the total, you know, universe of  
3 claims? You need to know that, unless it's just purely  
4 a pay as you go type proposal, you need to know what  
5 are the number of claims.

6 So we had worked very closely with firms across  
7 the country to assess that, to get a handle on what the  
8 total number of claims were. All of that was done, all  
9 of that was done before -- before J and J filed its  
10 first bankruptcy. Then, when J and J filed its first  
11 bankruptcy in October of 2021, at first, at first, I on  
12 behalf of our ovarian cancer team, I was pushing for  
13 resolution in that bankruptcy, in that bankruptcy  
14 context. And now I look back and I see that, that was  
15 -- you know, that was a mistake.

16 We had -- at that point, you know, there were  
17 Mesothelioma lawyers that were representing clients on  
18 the T.C.C. and they were saying, no, you can't, you  
19 can't. We've had experience with bankruptcy, we've had  
20 experience with the Texas Two-Step. It will not work,  
21 you cannot get reasonable resolution in the bankruptcy  
22 context. I resisted that and I was pushing for  
23 resolution in the bankruptcy context at the beginning  
24 of LTL-1.

25 But then after we got -- so through that process,

1 you know, the LTL-1, you know, was filed in North  
2 Carolina, it was transferred to Judge Kaplan here in  
3 New Jersey. Judge Kaplan, you know, urged mediation.  
4 That didn't happen, I mean, not officially before the  
5 motion to dismiss hearing but we did engage.

6 We were trying to reach a resolution once Judge  
7 Kaplan denied the motion to dismiss. When he denied  
8 that motion to dismiss, he ordered mediation and he  
9 ordered Judge Joel Snyder and Gary Russo to serve as  
10 mediators and --

11 THE COURT: I think that's giving -- I'm  
12 sorry, Mr. Birchfield. I think that gets us to where  
13 -- what --

14 MR. POLLACK: Sure.

15 THE COURT: To the crux of your question.  
16 What did he know at that time frame?

17 BY MR. POLLACK:

18 Q Correct, I think you're right, Your Honor.  
19 Imerys, I know that everyone else probably knows more  
20 than I do. What was the Imerys bankruptcy?

21 A Imerys is a mining company, they were a supplier  
22 to J and J. So Imerys and Cyprus were suppliers. They  
23 both filed bankruptcies. The Imerys bankruptcy was  
24 filed I think in February of 2019 and Beasley Allen,  
25 Leigh O'Dell, Ted Meadows, we served -- we represented

1 a member of that Imerys Tort Claimants Committee, as  
2 well. There is a Cyprus, Cyprus filed bankruptcy, as  
3 well but that was primarily for Mesothelioma and we do  
4 not have a client on that committee.

5 Q During the course of the Imerys bankruptcy,  
6 did you have discussions with J and J regarding  
7 potential resolution of the talc claims?

8 A We did.

9 Q And over what time period did you have those  
10 discussions?

11 A So I believe that would have been in -- it would  
12 have been the fall of 2020 and up through the spring of  
13 2021.

14 Q Okay.

15 A Roughly.

16 Q And the -- were there -- was there a  
17 settlement matrix that you ever shared with anyone at  
18 that point in time?

19 A Yes. I mean, there was a settlement matrix that  
20 was developed and it's part of that process, as well.

21 Q And when you say the settlement matrix was  
22 developed, is this something that you worked on with  
23 the Talc Claimants Committee?

24 A Yeah, I mean, it is something that was, you know,  
25 presented to the -- you know, to the Tort Claimants



1 Committee. I'm just hesitant here because there are  
2 very, very strict rules about what goes on within the  
3 Tort Claimants Committees on this bankruptcies.

4 Q Fair enough. On the -- I lost my train of  
5 thought, I'm sorry. During the course of time in  
6 working on Imerys, did you gain insight as to what you  
7 believed were the settlement values that J and J was  
8 looking for; did you learn about their settlement  
9 position?

10 A Well, yes. Through the course of the  
11 negotiations, you know, we were given a pretty clear  
12 picture of at least what they were, you know, they were  
13 saying that they would be willing to pay at that point.

14 Q And if I were to pick the time -- I have on  
15 the calendar up here or the clock up here, 2019,  
16 roughly is when Imerys starts and 2024 is Imerys  
17 ongoing. I don't know if that's accurate. Were the  
18 number of claims, as you understood them, changing, the  
19 number of claimants and the number of types of claims,  
20 changing between 2019 and 2023 in Imerys?

21 A I'm having a little difficulty, you know, teasing  
22 out Imerys because I can't really speak to Imerys --

23 MR. POLLACK: So let me try to  
24 (indiscernible) let me ask you a different question  
25 because I probably screwed it up. I apologize, Judge,

1 as I am not a talc guy. I live a decent life, I have  
2 not done this talc stuff.

3 THE COURT: It's quite all right.

4 BY MR. POLLACK:

5 Q So I apologize if I botched it. Let me make  
6 the question broader. If I look at the number of talc  
7 claims regarding J and J, just generally between 2019  
8 and 2022-23, do you believe there was a change in the  
9 number and value of those claims?

10 A There was a significant change in the, you know,  
11 in the total number of claims. I mean, that is true  
12 and I mean, there are -- there were factors that, you  
13 know, any lawyer would weigh, you know, impacting the  
14 value or a reasonable settlement value. You know,  
15 those factors would change over time, as well.

16 But I mean, over the course of this litigation,  
17 over the last, you know, over the last ten years, there  
18 have been, you know, milestones that have impacted the  
19 total number of -- the total number of claims.

20 Q So if we could go to something that I'm dying  
21 to get into, I love numbers. We're going to go to  
22 Exhibit 7, sir, and this was one that Mr. Brody was  
23 asking you about. Let me know when you're there.

24 A I'm there.

25 Q And Exhibit 7 has a proposal from Jim Conlon,

1 Doug Dachille and Jon Disparavich (phonetic). I'm  
2 looking at Plaintiff's Plenary Hearing 66.

3 A Okay.

4 Q And it has a matrix then at the end of 67.

5 A Yeah.

6 Q So I want to focus first of all on the  
7 letter.

8 A Okay.

9 Q Am I correct in understanding that you had  
10 not seen this document nor a draft of it until you --  
11 this litigation began?

12 A That's right. I mean, the first time I saw this  
13 letter was when this motion was filed.

14 Q And if we go back to the e-mail that Mr.  
15 Brody was asking you about, which is Exhibit 4. Am I  
16 correct in understanding that you did not get a C.C. on  
17 this document either?

18 A Right, I did not.

19 Q Now, if we go to -- and I'm worried about  
20 timing here but we'll get into it, Exhibit 6, which is  
21 Plenary -- it's Exhibit 7, it's the last page of the  
22 document. It's the matrix there.

23 A Yeah.

24 Q Could you walk us through -- first of all,  
25 who created this matrix?

1 A I did, in conjunction with the leadership  
2 committee on the talc claims.

3 Q So there's been a lot of questions and  
4 comments about the matrix, there had been oral argument  
5 about the matrix. Since you are the author of it, you  
6 might be the one to say. What -- can you explain to  
7 the Court this matrix? What is this telling -- what is  
8 this telling the receiver, what are you trying to  
9 describe?

10 A So this -- this -- the way that this would work is  
11 that, if a -- and this is -- this is not, you know,  
12 uncommon. We develop similar type matrixes in other  
13 litigations. You know, we developed a similar one in  
14 Vioxx in the early mid-2000's. but the way that this  
15 would work is a claimant, a client, would be able to  
16 identify, okay, when was I diagnosed? How old was I  
17 when I was diagnosed?

18 And then, what was the injury, what stage? What I  
19 diagnosed with Stage 4? You know, if I was diagnosed  
20 with Stage 4 when I'm 55 years old, then you would see  
21 that, that is -- that would -- the allocation there  
22 would be 500,000, 531,995, that's how it would work.  
23 And then there would be a term sheet would provide  
24 qualification criteria and that's a key component.

25 And that is a -- that's a primary, a significant

1 reason, for our opposition and especially our  
2 opposition to this last proposal. What we would base  
3 our, you know, any settlement on would be the claims  
4 that are supported by the medicine and the science for  
5 the ovarian cancer, you know, claimants.

6 The type of cancer, the sub-types that were  
7 supported by the science. You know, you're talking  
8 about the epithelial ovarian cancer, it can be the  
9 fallopian tube or peritoneal cancers, all the same,  
10 that's the same. But if you meet that criteria, you  
11 have the appropriate sub-type, then you would be  
12 qualified here. And so that's how the matrix would  
13 work.

14 Q So when I was talking to Mr. Conlon, I think  
15 I talked about peanut butter and chocolate in Reeces  
16 cups because it was almost lunch. The part of the deal  
17 in Exhibit 7 is a Jim Conlon thing and the attachment  
18 is an Andy Birchfield thing. Is that -- do you believe  
19 that's a fair statement?

20 A Yes, I mean, the matrix, the matrix, that is  
21 definitely us. I mean, me on behalf of the team, the  
22 ovarian cancer team, yeah.

23 MR. POLLACK: Did you ever --

24 THE COURT: May I ask a question, Mr.  
25 Pollock?

1 MR. POLLACK: Yes, yes, Your Honor.

2 BY THE COURT:

3 Q I apologize. So the total funding of this  
4 matrix is \$19 million?

5 A No, sir.

6 Q What's the total funding of the matrix? If  
7 you know.

8 A Well, in order to determine that -- I mean, I can  
9 tell you what --

10 Q But it's more than \$19 million, \$19 billion?

11 A No, sir, it would be -- it would be less than the  
12 19 billion. So the 19 billion that -- that the Legacy  
13 proposal includes, that is a proposal for Legacy to  
14 acquire an entity with all of J and J's talc liability  
15 for all time.

16 So that would include -- it would include the  
17 current ovarian cancer claims, it would include the  
18 future ovarian cancer claims, it would include, at the  
19 time that this proposal was made, it would have  
20 included the Mesothelioma present and future. It would  
21 have included the Attorney General's actions. So you  
22 had the two states that were litigating but you also  
23 had an ad hoc group of 42 states.

24 So essentially, all the states had claims. It  
25 would have included all -- any talc related liability

1 from J and J. And so you know, most of those buckets  
2 are fairly easy to model. The talc -- I mean,  
3 Asbestos, Mesothelioma, that litigation has been going  
4 on for decades.

5 There are easy ways to model how many claims you  
6 will have each year. It's much more difficult with  
7 ovarian cancer. That's why, you know, for a Legacy  
8 proposal, they needed, they needed information from us.  
9 We didn't need information from them, they needed  
10 information from us.

11 THE COURT: Thank you. I apologize, I didn't  
12 want to get too far afield because I wanted to stay, I  
13 wanted to make sure my question was addressed to the  
14 current questions that you were posing, so.

15 MR. POLLACK: Your Honor, this is your  
16 courtroom and I respect that and we are here to answer  
17 your questions. You're the audience, so jump in  
18 anytime you want.

19 BY MR. POLLACK:

20 Q Is it fair to say that you never haggled with  
21 Jim Conlon over the values in your matrix? Your values  
22 are your values?

23 A That is true. I mean, this is the product of a  
24 matrix that, this wasn't our first. You know, this  
25 wasn't our first matrix, this wasn't our opening demand

1 in this litigation. Before we got to this matrix, it  
2 had been compromised -- we had compromised through two  
3 rounds of mediations, I mean, to some extent.

4 J and J really didn't engage in the mediation in  
5 LTL-2 but we had engaged in negotiations through LTL-1  
6 and then even following the dismissal. So and as I had  
7 mentioned earlier, you know, we had put together a  
8 matrix.

9 We, the ovarian cancer team, had put together a  
10 matrix very similar to this and a term sheet in March  
11 of 2023, that we offered to present to J and J, in a  
12 meeting with Mr. Haas and Ms. Forminard, their General  
13 Counsel, but they declined that meeting but that was  
14 put together. This matrix is a compromised matrix  
15 through years of negotiation but this was our matrix.

16 Q But to put a point on it, you weren't  
17 compromising with Jim Conlon?

18 A No, no, we were not haggling, we were not  
19 discussing, we were not negotiating matrix.

20 Q So I'm going to quote from the language of  
21 R.P.C. 1.6, first line, "A lawyer shall not reveal  
22 information relating to representation of a client  
23 unless the client consents," and it does go on from  
24 there. Under oath, to the best of your knowledge and  
25 belief, at any point in time, did Mr. Conlon ever



1 reveal to you any information that he had learned while  
2 at J and J?

3 A No.

4 Q The -- sitting here today, I recognize it's  
5 impossible to look behind a black screen of what Mr.  
6 Conlon learned during the course of his representation  
7 of J and J at Faegre. Is there anything that you can  
8 think of that he would have learned, having heard his  
9 testimony, that was conceivably relevant to your  
10 position representing clients in Beasley Allen?

11 A Not at that point in time. By the time I met him,  
12 there would have been nothing that I can think of.

13 Q And have you seen a single document, record,  
14 anything here that Mr. Conlon shared any J and J  
15 confidences with you?

16 A No.

17 MR. BRODY: I'm going to object to that, Your  
18 Honor. He's (indiscernible) really, he's asking for an  
19 opinion on the evidence.

20 THE COURT: Are you asking for an opinion or  
21 a fact, Mr. Pollack?

22 MR. POLLACK: I'm asking a factual question.  
23 He is being accused of having received information --

24 THE COURT: To the extend he knows.

25 MR. POLLACK: And he said he did not.

1 THE COURT: Right, Mr. Brody. But I think  
2 the Court's questions earlier all based on your  
3 questions, Mr. Brody, is you know, candidly, he may not  
4 know, he wouldn't know.

5 MR. BRODY: Exactly, exactly, Your Honor.

6 THE COURT: So his testimony is, no.

7 MR. POLLACK: We can address this later. I  
8 think his testimony is more than that. I think it's,  
9 no, I didn't receive anything and it's also, no, I  
10 can't think of anything that he could have shared that  
11 was relevant. So let me drill down on this a little  
12 bit, if you would?

13 THE COURT: Go ahead.

14 MR. POLLACK: He's at Faegre until -- I can't  
15 --

16 THE COURT: March 2023.

17 BY MR. POLLACK:

18 Q March '23. So during -- can you describe  
19 briefly for the Court the changes in the number of tort  
20 claims, Asbestos claims, that are out there between  
21 June 2020 and -- I'm sorry, March 2023. Can you  
22 describe what the evolutionary change is, if there's  
23 any?

24 A Okay, well, yes. There was a significant -- I  
25 mean, there was a significant increase in the total

1 number of claims. And I'm -- I mean, I apologize.  
2 This is just -- there is so much mixed in here and I  
3 want to be clear because from our perspective, you talk  
4 about two different things.

5 You talk about the total number of compensable  
6 claims versus the total number of claims. And so to  
7 answer your question, I really need to know, what are  
8 you asking?

9 Q Let me break it out.

10 A Okay.

11 Q That's a fair comment. So at what -- Andy,  
12 you know the dates better than I do. L.T.L. was filed,  
13 according to (indiscernible) October 2021, L.T.L. is  
14 dismissed on January of 2023. Does that sound about  
15 right?

16 A Yeah, the Third Circuit issued its opinion on  
17 January the 30th, 2023.

18 Q Okay.

19 A It was the mandate issued, it was technically  
20 dismissed by Judge Kaplan on April the 4th of 2023.

21 Q And so -- and you live in this world, right.  
22 Does the number of claims out there, did that change  
23 significantly as a result of the Third Circuit's  
24 rejection of the L.T.L. plan?

25 A I wouldn't say that there was a significant number

1 of changes as a result of the Third Circuit. I mean,  
2 there were -- along the scope of this litigation, you  
3 know, there had been some key events that have, you  
4 know, caused spiked in the number of claims and the  
5 number of claims filed.

6 And you know, some were verdicts, some were the --  
7 you know, the Supreme Court's decision in Ingum, you  
8 know, the Daubert rulings and but the biggest, the  
9 biggest spike in the total number of claims came as a  
10 result of the L.T.L. filing. And that is because --  
11 that's a major concern from my perspective because  
12 we've always looked at, you know, what are the  
13 compensable claims?

14 So Ms. O'Dell, Mr. Parfitt, as part of the M.D.L.,  
15 they communicate with lawyers. They communicate and  
16 they have over the course of these years, indicate,  
17 telling them; you know, this is what the science shows,  
18 these are the types of cases that are supported by the  
19 science, just this finite group. But then when J and J  
20 filed its second bankruptcy, they brought in all these  
21 other claims.

22 These other gynecological cancers that are not  
23 supported to-date by the scientific literature. So  
24 cervical cancer cases, uterine cancer cases, vaginal  
25 cancer cases, you know, other types of cases. You

1 know, they are serious injuries, they're just not  
2 (indiscernible) but the -- in the second bankruptcy, in  
3 the third that is proposed, that's what -- they are  
4 bringing those claims in.

5 They're bringing those claims in and would have  
6 them vote. They would vote and vote on a plan that, if  
7 passed, would then force these unreasonably low values  
8 on the meritorious claims, the claims that are  
9 supported by the science.

10 Q Let me switch gears with you for a second  
11 here. With regard to expert, Mr. Brody intimated in  
12 the first day before Judge Porto that Mr. Conlon, who  
13 was citing a case from the District Court of New  
14 Jersey, that he was an expert. Did you ever retain Jim  
15 Conlon as an expert?

16 MR. BRODY: I'm just going to object to the  
17 characterization of my argument from January 17th  
18 because it is inaccurate.

19 THE COURT: Well, you'll have an opportunity  
20 to address that but I certainly, our record reflects  
21 what it is but go ahead, Mr. Pollack.

22 BY MR. POLLACK:

23 Q I'm not going to quivel. Did you retain him  
24 as an expert?

25 A No.

1 Q Did you ever seek advice from him regarding  
2 how to prosecute or pursue your claims against J and J?

3 A No.

4 Q Side-switching lawyer was another argument  
5 that was raised. Did you ever retain Mr. Conlon?

6 A No. I mean, from the very beginning of any  
7 interaction with Jim Conlon or Legacy, I recognized, I  
8 recognized the role that they would play and they would  
9 be standing in the shoes of J and J. They would be our  
10 adversary and any claim, any -- the proposal that we  
11 put forward, the proposal that is in here, it is an  
12 opt-in proposal.

13 Clients would voluntarily choose to accept the  
14 settlement or not and if -- if the settlement -- if  
15 they chose not to, then -- or if the settlement  
16 proposal didn't meet the threshold of 95 percent,  
17 Legacy would be litigating. They would have full  
18 responsibility, full liability, we would be litigating  
19 against them.

20 So I approached this. Our team, you know,  
21 approached this with that understanding and that  
22 appreciation. They would be our -- they would be the  
23 adversary, they would be on the opposite side of the  
24 (indiscernible) if J and J chose to sell off its -- all  
25 this talc liability to Legacy or to whoever.

1 Q Mr. Brody has argued repeatedly that there  
2 was an alliance between you and Jim Conlon to work  
3 against J and J. Do you agree that you were ever in an  
4 alliance with Mr. Conlon to work against the interest  
5 of J and J?

6 A No.

7 Q Why not?

8 A As I just said, I mean, this was -- this was not  
9 -- it was not against J and J. It's against, it's  
10 against the proposal that Mr. Haas has said is his  
11 preferred method, his preferred bankruptcy but it's not  
12 opposed to J and J. I think this is -- I think that  
13 getting rid of the talc liability would actually be in  
14 the best interest of J and J.

15 Q Did you ever sit down with Jim Conlon and  
16 say, Jim, I got an idea, we can get more money out of J  
17 and J this way. Was that ever one of the discussions  
18 you had?

19 A No.

20 Q So when I look at Exhibit 4, it says from Jim  
21 Conlon to Duane Van Arnsdale, Doug Dachille, Erik Haas  
22 and Andrew White. It says, "Duane, thank you for your  
23 efforts to evaluate our proposal." Whose proposal is  
24 it?

25 A It's Legacy's proposal.

1 Q And that's a proposal that you had not seen  
2 before it was sent to J and J; correct?

3 A Correct.

4 Q And at the end it says, "Andy Birchfield,  
5 Doug Dachille and I are prepared to meet with you."  
6 Did you ever take from that sentence that the idea --  
7 or was it your belief that you two were going to link  
8 up, that is you and Legacy were going to link up and go  
9 attack J and J and take them for everything they're  
10 worth?

11 A No, not at all.

12 Q What was your understanding of what the  
13 meeting was about?

14 A The meeting was -- as I understood it, at least as  
15 the invitation to me, would I join, would be for me to  
16 talk about the matrix and how it would provide a  
17 measure of certainty. You know, that the auditors, the  
18 external auditors, Pricewater House, would be able to  
19 factor in because they would have to give sign off on  
20 the -- they would have to sign off on the gap  
21 procedure, ASE-450.

22 They would have to sign off on that to remove the  
23 non-cash charge from J and J, to get the talc liability  
24 off of J and J's books. And the uncertainty around the  
25 ovarian cancer case liability would be a factor that



1 could provide a wide range and as external auditors, to  
2 cover themselves, they would have to go on the highest  
3 end. This would provide some measure of certainty  
4 about what the ovarian cancer liability could be  
5 resolved for.

6 And so you know, to explain that and for Legacy  
7 people to explain the structural optimization and  
8 disaffiliation and how that would benefit J and J, that  
9 was my understanding. My role would have been to talk  
10 about the matrix, to talk about the values in the  
11 matrix and what that would add up to. And Judge Porto,  
12 you asked me about the value and before I got to that,  
13 you asked about, is it more than the 19 billion.

14 This matrix, the matrix value here before there  
15 are any reductions for risk factors, based on what we  
16 know about the universe of the claims, the value of  
17 this would be approximately a 300,000 case average for  
18 the legitimate claims. When I say legitimate, I don't  
19 mean to disparage any cancer victims but there are,  
20 there are cases, there are the ovarian cancer, the  
21 epithelial ovarian cancer, there are certain sub-types  
22 that are supported by the science.

23 If it's limited to that, this grid would be a  
24 300,000 case average. We know that. We can't look at  
25 this grid and determine that but we know because we

1 have worked on this for a long time, we know what a  
2 reasonable projection of how many claimants would fall  
3 into each of those boxes.

4 So we can make that calculation of what this grid  
5 would average and that's what we have done but it is,  
6 based on the much smaller universe, the total number of  
7 claims because J and J is now saying that the total  
8 number of current claimants is 100,000. You know, we  
9 would say that the total number of claimants that meet  
10 true qualifying criteria are significantly less than  
11 that.

12 Q I'm going to move on topics. You got  
13 questioned today regarding common benefit. On page 49,  
14 lines 10 through 12, Mr. Haas, throughout the common  
15 benefit fee, he was not available and the plan at  
16 L.T.L. was advancing --

17 MR. BRODY: Sorry, page 49 of what?

18 MR. POLLACK: Page 49 of, I apologize Steve,  
19 it's Erik Haas' direct on March 25.

20 MR. BRODY: Okay.

21 MR. POLLACK: You can take my copy.

22 MR. BRODY: That's all right, no, I have one.

23 BY MR. POLLACK:

24 Q If the common benefit fee was not available  
25 and the plan of L.T.L. was advancing in the L.T.L.

1 bankruptcy. Here it is, Steve. And you were  
2 questioned about it today. Do you agree with Mr. Haas  
3 that you are not entitled to -- I'm sorry, let me try  
4 it this way. Was the driving factor for you, at any  
5 point in time regarding the L.T.L. bankruptcy, that you  
6 would not get common benefit?

7 A Absolutely not. I mean --

8 Q Why not? What did Mr. Haas get wrong?

9 A Well I mean, first of all, I mean, there is no  
10 principle that you cannot -- you cannot -- that a  
11 bankruptcy court cannot award common benefit fees. But  
12 the thing that is so frustrating here is that, you  
13 know, that we have resisted overtures, we have resisted  
14 overtures, to negotiate a common benefit fee. We are  
15 not going to do that.

16 We are firmly committed that we will look out for  
17 the best interest of our clients. If we take care of  
18 getting reasonable compensation for our clients, the  
19 common benefit fee will take care of itself. We are  
20 not going to put that ahead of the clients and the  
21 client interests. The reason -- the reason that we are  
22 opposing bankruptcy is because of the values that are  
23 being offered in bankruptcy.

24 If you look at the proposal, you look at the  
25 proposal that they had in LTL-2, you look at the

1 proposal that they rolled out on Wednesday. They have  
2 a payment schedule, a payment schedule. It would be  
3 \$4.34 billion that would be available during the first  
4 seven years. So that would be for your current  
5 claimants. Current claimants would be paid within  
6 that.

7 They're saying there's 100,000, 100,000 claimants,  
8 that would be a 43.4 thousand average, case average.  
9 Now, there would be a range there but you cannot, at  
10 that total number, even if you were to limit it to the  
11 truly compensable cases, you cannot get to fair values  
12 for the claimants here. We know, we know because we  
13 have been looking at this for a long time. What are  
14 the elements that would be going into a reasonable  
15 compensation for the claimants?

16 One, you have the medical cost. The medical cost  
17 for especially someone in their 50's or younger that is  
18 diagnosed with a Stage 4, those easily exceed a million  
19 dollars, just in the medical cost. And if you have, if  
20 you look at the matrix, I mean, there are Stage 1 cases  
21 that go up to 80 years old or so. The cost for  
22 treating someone who is 80 and diagnosed with Stage 1,  
23 that's in the tens of thousands, it's much lower.

24 But we know that the weighted average across this  
25 entire spectrum would be about 224,000 average case

1 value. The numbers that they are putting forward in  
2 this bankruptcy and their bankruptcy proposal would be  
3 truly pennies on the dollar.

4 THE COURT: And that's getting -- you know,  
5 there's no objection by Mr. Brody but in terms of where  
6 we are. I think you're getting a little bit far afield  
7 from your question but certainly, that's the testimony,  
8 but.

9 MR. POLLACK: I'll move it along, Your Honor.

10 THE COURT: You want to get us back to what  
11 he knew with regard to Mr. Conlon, what Mr. Conlon may  
12 or may not have conveyed to him.

13 MR. POLLACK: We can, Your Honor, I'm going  
14 to move it along. There was one direct -- part of  
15 their theory of the case was to argue that Andy is a  
16 bad guy and he's not credible. And one of the points  
17 Mr. Haas made at direct solicitation of Mr. Brody's  
18 testimony was that the bias here is because Andy is  
19 looking for a payday and the way that the payday works  
20 is that you get -- you don't get common benefit in  
21 bankruptcy.

22 So I will move it along. I do need to  
23 address it one more time because he squarely addressed  
24 it during the course of direct and I need to respond.

25 THE COURT: Yes, you do.

A. Birchfield - Redirect

110

1 MR. POLLACK: But I also understand loudly  
2 and clearly, we want to get this done today. I think  
3 we're going to, I just need -- if you give me a little  
4 bit more leeway, I would appreciate it.

5 THE COURT: Go right ahead.

6 BY MR. POLLACK:

7 Q So if you go back to your binder exhibits,  
8 page 5 -- I'm sorry, Exhibit 5, I'm looking at page 29.  
9 It's Plenary Exhibit 56.

10 A Yeah.

11 Q Let me know when you're ready.

12 A What page, I'm sorry?

13 Q It's Plenary Exhibit 56, Exhibit 5.

14 A Yes, I'm there.

15 Q Okay. So before you go and read that, let me  
16 just ask you. Mr. Haas has argued that you admitted  
17 that you are not entitled to common benefit before. Do  
18 you agree that you ever admitted that you are not  
19 entitled to common benefit?

20 A No.

21 MR. BRODY: I'm just going to object and ask  
22 for a reference.

23 THE COURT: On the page number, I think it's  
24 line 9.

25 MR. POLLACK: Yeah, I have lines 9 through

1 14.

2 THE COURT: Thought so, okay.

3 BY MR. POLLACK:

4 Q So lines 9 through 14. We'll come back.

5 This is a questioning of you and you were deposed  
6 before; correct?

7 A Yes.

8 Q And you were deposed on or about April 17th,  
9 2023?

10 A Yes.

11 Q And you were asked the following question by  
12 Mr. Haas, "We'll come back to that in a moment but you  
13 understand that as a general matter in bankruptcy, you  
14 would not be entitled to any portion of a common  
15 benefit fund that you would be entitled to outside of  
16 the bankruptcy; correct?" Answer, line -- answer, "No,  
17 I do not." Is that the answer you gave?

18 A It is.

19 Q And do you stand by that answer today?

20 A Yes.

21 Q There was also a question regarding a -- bear  
22 with me for one second, I'm sorry, Judge. I'm going to  
23 go to -- you were handed a transcript of April 17, 2023  
24 the last time we were here and the -- and in  
25 particular, Mr. Haas had argued during the first day

1 that you had backed out of a deal. Do you recall  
2 having that testimony from Mr. Haas?

3 A I recall that testimony --

4 MR. BRODY: I'm going to object, it  
5 mischaracterizes the testimony.

6 THE COURT: It's not that we're going to base  
7 our evidence, any evidence decision or make a fact  
8 finding on the question. So I remember the question,  
9 Judge Singh, I'm sure, remembers that question because  
10 that drew a reaction, candidly, of what I recall, you  
11 know, from many, many individuals. So why don't you  
12 synthesize the question down.

13 MR. POLLACK: Sure.

14 THE COURT: I got your point, Mr. Brody, but  
15 yeah.

16 MR. BRODY: Thank you.

17 MR. POLLACK: If you want me to spend the  
18 time for ten minutes, I can find the exact quote. I  
19 think the sum and substance of what I just said is  
20 absolutely right. Mr. Haas accused Andy of having  
21 backed out of the deal in the Imerys bankruptcy and  
22 said, we had a deal at \$3.5 billion and you backed out.

23 And simply, since this is redirect, I'm  
24 allowed some latitude, I believe. If you want me to  
25 find the exact quote, I can find the exact quote. It



1 will take me ten minutes to do it.

2 THE COURT: Can you help, Mr. Brody?

3 MR. BRODY: Well, I think the problem is  
4 trying to build a characterization of Mr. Haas'  
5 testimony into the question. I mean, he could just ask  
6 him a question about the deal, I think we can get to  
7 where he's going.

8 THE COURT: And that's a fair  
9 characterization. Do you remember that question with  
10 regard to purportedly the deal and something happened  
11 to that deal?

12 THE WITNESS: Yes but there are two separate  
13 deals --

14 THE COURT: But -- all right.

15 MR. POLLACK: Let me run with it, Andy.

16 THE COURT: Go right ahead.

17 MR. POLLACK: And Judge Porto will tell me if  
18 I screw it up, okay, is that fair?

19 THE COURT: That's fair but --

20 MR. POLLACK: Judges have been doing that --

21 THE COURT: I just want to hear the question.

22 MR. POLLACK: Judges have been doing that to  
23 me for years, I've gotten used to it.

24 BY MR. POLLACK:

25 Q I'm looking at the April 17th, 2023 exhibit

1 that transcript that Mr. Brody was kind enough to  
2 provide us last time. So I'm going to go to page 61 of  
3 that transcript.

4 Line 9, "Do you recall that August and September  
5 of 2020, you had further discussions with Johnson and  
6 Johnson's counsel regarding proposal to settle all  
7 ovarian cancer claims through the Imerys bankruptcy,"  
8 and there's a whole host of objections. Apparently,  
9 they were pretty excited that day.

10 And then it goes on again, page 63, line 24, "On  
11 September 5, 2020, you made a proposal, Mr. Murdica, on  
12 behalf of J and J, in this role on behalf of J and J to  
13 settle all the ovarian cancer claims, both current and  
14 future, for \$3.25 billion, right?" And that's page 64.  
15 Then again, a mountain of objections.

16 And at page 74, I'll have a question soon, "And  
17 you did not represent to J and J," this is line 3, "In  
18 connection with this settlement offer of 3.25 billion,  
19 that you had spoken to each and every one of the  
20 clients regarding a proposed offer, correct?" Your  
21 answer, line 8, "I did not. I did not make that  
22 representation."

23 "And you did not require, as an element of your  
24 offer, that each of the other participating law firms  
25 were required to get an affidavit to represent to

1 Johnson and Johnson that they had spoken to every one  
2 of their clients regarding the proposal, correct?"  
3 There's objections, answer, "We never got -- we never  
4 got to that point."

5 What did you mean when you said, "We never got to  
6 that point," what's going on?

7 A Well, I mean, this was a proposal that was made.  
8 It was not for --

9 Q Whose proposal, Andy, help me out?

10 A I made the proposal.

11 Q Okay.

12 A It was a term sheet and -- that was made, you  
13 know, to J and J. I was questioned about that term  
14 sheet in my deposition and it was characterized and  
15 being a \$3.25 billion proposal for all ovarian cancer  
16 claims, present and future.

17 And so, and through that colloquy and what Mr.  
18 Brody asked me about on April the 10th, I think when we  
19 were here was, did you submit it? I did submit that  
20 proposal. What I was objecting to is, it is not a  
21 \$3.25 billion proposal. That was only a portion of the  
22 settlement proposal then. That was it, that was --

23 Q So what's the total value? What's the real  
24 number and how do I break it out? Can you explain it  
25 to the Court, please?

1       A     Okay, that was a proposal that would have been  
2     testing my memory but I believe that the total would  
3     have 5.5 to in the 6 range, depending on how you count  
4     the present value because it would have provided a ten  
5     year payout for futures in that regard. But that was a  
6     proposal in September of 2020, when the total universe  
7     of claims, current claims, was much, much smaller.

8             But that's not -- that's not the proposal that Mr.  
9     Haas has accused me of reneging on. That was a -- and  
10    in the hearing, in the hearing last time on April the  
11    10th, there was probably what you saw, the reaction,  
12    was that there was a shift. Mr. Haas didn't say on  
13    April the 10th that I reneged.

14            He said that he received communication from the  
15    mediations that the committee would accept it and  
16    that's a different position than had been taken  
17    previously but that -- but those are two separate  
18    proposals. I was asked in my deposition about the, you  
19    know, that proposal in September of 2020. It was  
20    presented as a 3.25 -- in my deposition, it was  
21    presented as a \$3.25 billion deal, which it was not.

22            That's one and then later, there was an Imerys  
23    proposal and then there was a mediator's proposal. So  
24    we're talking about different steps along the way,  
25    different agreements but it was the mediator's proposal

1 that I was initially accused of reneging on and then it  
2 was purported that the mediators said that the  
3 committee would agree, which we did.

4 Q If we go on to one last question on page 94,  
5 same transcript of April 17, 2023, lines 12 to 17,  
6 let's call it. Mr. Haas, "So does that clarify, Mr.  
7 Birchfield, that?" Answer, "This is the proposal. It  
8 was made in September of 2020. The world has changed  
9 since September of 2020 in multiple ways that would  
10 impact a proposal." It goes on from there.

11 Can you describe for the Court, just to put this  
12 in context, this transcript is created April 17th, 2023  
13 and it's the bankruptcy, apparently. How had the world  
14 changed between September of 2020 and April 17th of  
15 2023?

16 A Well, in the -- in the scope of the talc  
17 litigation. So in September of 2020, there had not  
18 been a -- you know, a bankruptcy filing. You know,  
19 there had been an effort to do a bolt-on but you know,  
20 the number of claims, the number of claims had  
21 increased, you know, dramatically between September of  
22 2020 and then the time that deposition was given in  
23 April of 2023.

24 So the number of claims had shifted dramatically.  
25 Plus, there was the introduction by J and J in their

1 bankruptcy proposal, their L.T.L. proposal on April the  
2 4th of 2023, that all these other cancers should be  
3 included, as well. So that impacted, you know,  
4 matters.

5 But perhaps one of the bigger, you know, another  
6 big shift is we had gone through, we had gone through  
7 the threat of a J and J bankruptcy. You know, you're  
8 going to be in bankruptcy, your claims are going to be  
9 on hold for years and clients are going to die, the  
10 delay is going to cause significant problems. We had  
11 been through that.

12 We had gone through LTL-1, we had gone through the  
13 motion to dismiss trial, we had gone through the appeal  
14 to the Third Circuit and the Third Circuit had  
15 dismissed the bankruptcy for lack of financial  
16 distress. So that was a significant change.

17 At that point, even though they had filed their  
18 second bankruptcy on the strength of the Third Circuit,  
19 there was a significant change in the risk that we  
20 thought we were facing.

21 Q So subject to any questions the Court may  
22 have, I really only have one last question for you, Mr.  
23 Birchfield. You opposed the bankruptcy matter, the  
24 bankruptcy filing that J and J had proposed. Why did  
25 you propose -- why did you oppose that on behalf of the

1 Talc Claimants Committee and Beasley Allen?

2 A Okay, you say the bankruptcy filing, you're  
3 talking about LTL-2.

4 Q Yes, yes.

5 A You know, their second bankruptcy filing. The  
6 reason that we opposed that bankruptcy is because it  
7 would not provide, it would not provide reasonable  
8 compensation, you know, to the claimants. And the  
9 matrix, you know, the matrix values that we've put  
10 forward that is now public, that J and J has made  
11 public with this filing, those reflect reasonable  
12 values for legitimate claims.

13 And we are adamantly opposed to a bankruptcy or  
14 any settlement from a solvent defendant that would  
15 force a claimant to accept value. Even what we would  
16 conclude to be reasonable values, they shouldn't be  
17 forced to take that. But certainly, you know,  
18 certainly, they should not be forced to take  
19 unreasonably low values.

20 That's the only reason. The interest of the  
21 client is the only reason that we have opposed these  
22 bankruptcies and continue to oppose these bankruptcies.

23 MR. POLLACK: Your Honors, do you have any  
24 questions?

25 THE COURT: Judge Singh?

1 JUDGE SINGH: I do not.

2 THE COURT: I don't have any questions

3 either.

4 MR. POLLACK: Thank you, Judges.

5 THE COURT: Why don't we take our lunch

6 break, 45 minutes?

7 MR. BRODY: Sure.

8 MR. POLLACK: Yes.

9 THE COURT: Okay? Mr. Brody, how long do you  
10 think you'll need?

11 MR. BRODY: 20 minutes, maybe.

12 THE COURT: Okay, all right and we're  
13 adhering to Judge Singh's calendar with regard to  
14 supplemental briefing and when we return, we'll address  
15 the objections on like Exhibit 5 and with regard to the  
16 confidential client information, okay?

17 MR. POLLACK: Yes, Your Honor.

18 MR. BRODY: Thank you.

19 THE COURT: Thanks.

20 MR. POLLACK: Thank you both.

21 COURT OFFICER: All rise.

22 (Off the record at 12:29:00 p.m.)

23 (Lunch recess)

24 \* \* \* \*

25 (Back on the record at 1:16:35 p.m.)



1 THE COURT: Counsel, thank you, please be  
2 seated. We're going back on the record. Reconvening,  
3 Mr. Brody. What did you say, you have five questions  
4 left?

5 MR. BRODY: Not many more than that,  
6 actually.

7 THE COURT: Okay, all right.

8 MR. BRODY: So --

9 THE COURT: It probably was a little bit more  
10 but I was downplaying the questions, Mr. Brody.

11 MR. BRODY: No, it's not many, it's not many  
12 more than that.

13 THE COURT: And Mr. Birchfield, you're still  
14 under oath, sir.

15 THE WITNESS: Yes.

16 RECROSS EXAMINATION BY MR. BRODY:

17 Q Mr. Birchfield, you talked about some of the  
18 trials, the talc trials that the Beasley Allen Firm has  
19 had; do you recall that testimony?

20 A Yes.

21 Q And you talked about some verdicts that came  
22 out in 2016, I think you mentioned three in particular?

23 A Yes.

24 Q Right. None of those are still standing  
25 after the appeal; right?

1 A No, they -- none of the verdicts are standing,  
2 that's true.

3 Q Right.

4 A The verdicts were vacated and the trials are  
5 pending, awaiting retrial.

6 Q And it's basically fair to say that since  
7 2013, when Beasley Allen started representing talc  
8 plaintiffs, Beasley Allen has tried only 13 cases, not  
9 recovered a dime for claimants and has not settled any  
10 of the cases; right?

11 A I mean, the point that you're wanting to make is  
12 accepted, it's not true that we haven't collected a  
13 dime. We did have a co-counsel agreement in the -- for  
14 a plaintiff in the Ingum case but it is true that we've  
15 been in this litigation. We have a longstanding and  
16 continued commitment to this litigation, even though we  
17 haven't been paid a dime, that's true.

18 Q Right. So it is fair to say that since 2013,  
19 Beasley Allen has tried only 13 cases, not recovered a  
20 dime for claimants and not settled any of the cases?

21 MR. POLLACK: Objection, compound, asked and  
22 answered.

23 THE COURT: Why don't you break that question  
24 up? And you did ask the question, what's different  
25 about that question, Mr. Brody?

1 MR. BRODY: Well, there were a bunch of  
2 qualifications that preceded it. I was just trying to  
3 make sure the record is clean.

4 THE COURT: Certainly, that's fine. Why  
5 don't you just address each of those points, all right,  
6 Mr. Brody?

7 MR. BRODY: That's fine.

8 BY MR. BRODY:

9 Q So since 2013, Beasley Allen has tried only  
10 13 cases; right?

11 A We have had -- we have had 13 cases go to trial.  
12 I mean, some of those cases are cases that were our  
13 cases, some we were helping other law firms, but yes.

14 Q Beasley Allen has not recovered a dime for  
15 the claimants?

16 A Not true. I mean --

17 Q Fair enough and has not settled any of the  
18 cases; right?

19 A We have not settled any of the cases.

20 Q All right. Do you have a copy of your April  
21 2023 deposition in front of you up there?

22 A I do not.

23 MR. BRODY: All right, I'll give you -- I'll  
24 give you a copy. If I may approach, Your Honor?

25 THE COURT: You may. Do you have a copy of

1 that, Mr. Pollack?

2 MR. POLLACK: I do not.

3 MR. BRODY: I'll give you a copy, it's the  
4 one you were reading from earlier.

5 MR. POLLACK: Okay, is it the same big fat  
6 thing?

7 MR. BRODY: Yeah.

8 MR. POLLACK: Okay, then I probably have it.

9 THE COURT: Oh, well it's not one of the  
10 exhibit either?

11 MR. POLLACK: I'm sure -- thank you.

12 MR. BRODY: Yeah, I think it's in the  
13 exhibits, as well.

14 MR. POLLACK: We're good, thank you, Judge.

15 BY MR. BRODY:

16 Q It's within the excerpt that is in the  
17 exhibits, as well. So if you turn to page 58, line 20;  
18 are you there?

19 A Yeah.

20 Q And you were asked the question, so since  
21 2013 with respect to the 11,300 claims that Beasley  
22 Allen represents, Beasley Allen has tried only 11  
23 cases. There have been two in Florida this year in  
24 addition to that; right?

25 A That's correct.

1 Q "Not recovered a dime for claimants and not  
2 settled any of the cases; is that fair?" And your  
3 answer was, "That's basically fair," correct?

4 A Correct, that's basically fair.

5 Q That was -- that's -- all right. You can set  
6 that aside. The -- you were asked questions by Mr.  
7 Pollack about whether a contribution to the M.D.L.  
8 common benefit fund could be part of a bankruptcy  
9 resolution; do you recall those questions?

10 A Yes.

11 Q And you understand, however, that a  
12 contribution to the M.D.L. common benefit fund was not  
13 part of J and J's proposed bankruptcy resolution;  
14 right?

15 A I understand that, yes.

16 Q All right. You talked about a settlement  
17 matrix that you shared with J and J during the course  
18 of the Imerys bankruptcy; do you recall that testimony?

19 A Yes.

20 Q You were not privy to Johnson and Johnson's  
21 internal privileged and confidential discussions of  
22 that settlement matrix; were you?

23 A No.

24 Q Last thing I want to ask you about. Last  
25 thing I want to ask you about. You indicated that as a

1 result of your leadership position, that you at times  
2 are representing not only your own clients' interests  
3 but the interests of clients of other lawyers; right?

4 A What I said is that, we view -- we view our role  
5 as a leadership role in the M.D.L. as having a  
6 fiduciary duty to the other claimants and their  
7 counsel.

8 Q Fair and that was going to be my next  
9 question. You indicated that you have duties to them;  
10 right?

11 A Right.

12 Q And one of the things you talks about, with  
13 respect to the Legacy proposal that you testified about  
14 was this idea that Legacy, if the proposal were  
15 accepted, would be adverse to you and your clients;  
16 right?

17 A Yes.

18 Q That they would then hold the entity that had  
19 talc liabilities --

20 A Right.

21 Q -- and in essence, they would be on the other  
22 side of the bead from where you are; right?

23 A Yeah, that's right.

24 MR. BRODY: Now, if I may, I just -- to  
25 reorient ourselves from April 10th. If I may approach

1 with another excerpt from the privilege log?

2 THE COURT: You may.

3 BY MR. BRODY:

4 Q And this just makes it easier than sorting  
5 through the (indiscernible) okay, we pulled out from  
6 that entries that -- and we talked about some of these  
7 on April 10th, where Ms. O'Dell shared an ovarian  
8 cancer leadership memo with Legacy, discussing ovarian  
9 cancer case values, injuries and damages analysis; do  
10 you see that?

11 A Yes.

12 Q Your ovarian cancer claim values, as well as  
13 claim estimation report methodology; do you see that?

14 A Yes.

15 Q And then we talked about Nile Davies who is  
16 listed on here sharing draft Q.S.F. qualifications for  
17 the Legacy ovarian cancer proposal; do you see that?

18 A I do.

19 Q And Mr. Davies, is he still with the Beasley  
20 Allen Firm?

21 A He is.

22 Q All right and he was at the time; right?

23 A Yes.

24 Q Right and so you gave somebody you've  
25 identified as a potential future adversary your

1 analysis of case values, injuries and your damages  
2 analysis, if I'm reading this correctly; right?

3 A (indiscernible)

4 Q Yes?

5 A Yes --

6 MR. BRODY: Thank you, that's all I have.

7 THE WITNESS: Okay.

8 THE COURT: Thank you. Mr. Pollack, anything  
9 to follow up?

10 MR. POLLACK: Sure. Using the last document  
11 which I don't think it was marked for identification.  
12 Do you want to give it a number or what do we want to  
13 do?

14 MR. BRODY: Sure. I believe the privilege  
15 log was marked as JJ-1.

16 THE COURT: Right.

17 MR. BRODY: So maybe the excerpt that I used  
18 earlier today could be JJ-1-A and this excerpt can be  
19 JJ-1-B, if that's okay?

20 THE COURT: Fair. Mr. Pollack, any thoughts?

21 MR. POLLACK: Works for me.

22 THE COURT: A and B, yep.

23 MR. POLLACK: Simple. On whatever you said,  
24 just 1-B, the one you have in front of you.

25 THE WITNESS: Right.



1 REDIRECT EXAMINATION BY MR. POLLACK:

2 Q That one. Can we agree that these documents  
3 were subjected to a mediator -- I'm sorry, a mediation  
4 privileges claim; correct?

5 A Pardon me? Yes.

6 Q Mediation -- they were submitted for review  
7 by Judge Snyder; correct?

8 A Yes.

9 Q And Judge Snyder reviewed them and decided  
10 they were privileged too; correct?

11 A Yeah, I mean, he entered his order, yes.

12 Q Right and his order says they're privileged;  
13 right?

14 A Right, that's right.

15 Q Okay. Do you believe Judge Snyder is  
16 capable?

17 A I do.

18 Q Do you think he understands the players in  
19 the game?

20 A I do.

21 Q Fair enough. So Mr. Brody got into the  
22 question of how you have tried 13 cases and some of  
23 them are somebody else's cases, some of them are your  
24 cases. Let's just call it 13, we'll make it simple,  
25 I'm a simple guy. So let's call it 13 cases and you

1 have not collected a significant amount.

2 I'm having a hard time reconciling this because  
3 I'm looking at the numbers that are being offered in  
4 settlement and they are different with zero value. So  
5 how do you value the claims, what do you think the  
6 value of these claims is, in broad brush? Why are you  
7 pursuing -- let me ask it differently, why are you  
8 pursuing it?

9 THE COURT: And you're talking about current  
10 claims, future claims or claims with merit, as --

11 BY MR. POLLACK:

12 Q Good point. So let me go back, since I  
13 slaughtered this question and I'm going to try to clean  
14 it up, I'll do it the right way. Beasley Allen, you've  
15 said, is trying to get reasonable and fair value for  
16 its clients. You testified to that before; right?

17 A Yes.

18 Q What are the claims that you think are the  
19 ones you are pursuing today? Can you describe that  
20 category of claims?

21 A You know, the claims that we are pursuing are the  
22 ovarian cancer claims. I mean, that's the leadership  
23 role that Beasley Allen has, pertains to the ovarian  
24 cancer claims. I do think that Beasley Allen has one  
25 maybe two Meso claims but our focus is and has been

1 since 2014 for the ovarian cancer claimants.

2 Q And we've heard about the -- if I get it off  
3 by a little bit or I'm wrong, 3.2 billion -- 3.52  
4 billion in Imerys. We've heard about the 7.9 billion  
5 that is J and J's preferred plan. Is that the -- to  
6 address the ovarian cancer claims, is that what those  
7 numbers are targeted at?

8 A Yes, so there have been multiple proposals, term  
9 sheets, that have been -- that have been proffered  
10 through the course of these last four years and  
11 including the proposal that we talked about in  
12 September of 2020 that was presented as a 3.25 but that  
13 was just one slice, it wasn't a 3.25. That was one  
14 proposal in 2020.

15 The number of claims was much different, the  
16 number of claims was much different then. We have the  
17 -- not the 7.9 but the \$8.9 billion proposal that was  
18 part of the LTL-2 bankruptcy. That was for both the  
19 ovarian cancer currents and the futures, Mesothelioma  
20 currents and futures and all of the Attorney General's  
21 actions.

22 But the only -- I mean, our position, whether we  
23 have been -- you know, whether it was in the earliest  
24 proposal in 2020 or part of the Imerys deal or  
25 negotiations mediation in the bankruptcy, it has always

1       been to get reasonable settlement values for our  
2       claimants, for our clients and that's it.

3           Q       And do you believe in good faith, that the  
4       claims you have are pursuing, on behalf of Beasley  
5       Allen and the M.D.L., the Talc Claimants Committee, the  
6       groups you work with, do you believe that those claims  
7       have merit?

8       A       Yes, absolutely.

9           Q       And do you intend to pursue them?

10      A       Yes.

11               MR. POLLACK: I have no further questions.

12               THE COURT: Thank you. You may step down,  
13      Mr. Birchfield.

14                       (Witness excused)

15               THE COURT: Let's quickly address. Yes?

16               MR. BRODY: With the Court's permission, I  
17      would like to ask Mr. Haas to -- the Court to allow Mr.  
18      Haas to take the stand to answer five or so questions  
19      about the document that was brought and offered as P-3  
20      by Mr. Conlon.

21               MR. POLLACK: Your Honor, absolutely not. We  
22      have been patient to (indiscernible) on your end and  
23      our end. To suddenly allow Mr. Haas to megaphone, once  
24      again. There is nothing in that document that could  
25      not have been addressed before and there is no reason

1 we should be addressing it now.

2 Mr. Haas knew about this document, he  
3 received this document. So there's no reason he  
4 couldn't have addressed it before. The fact that they  
5 withheld it and now they're saying we now want to  
6 address it, that's ludicrous. At some point, there has  
7 to be an end, Your Honors. I respectfully submit that  
8 should be it.

9 THE COURT: Well, Judge Singh and I will  
10 discuss that separately. Counsel can be seated. The  
11 initial question we want to address is what was  
12 contained in the correspondence that we received this  
13 week. Regarding Exhibit 5 and objections, J and J has  
14 objections. To the extent J and J has any objections,  
15 we would receive that document with J and J's  
16 objections. Mr. Pollock, Mr. Brody, any thoughts?

17 MR. POLLACK: So there's only -- there's one  
18 word that is objected to. The one word is,  
19 "Recommended," I think it is. And you had already  
20 ruled, Judge Porto, that did Jim Conlon recommend the  
21 Texas Two-Step? He says, I did not. And so to me, it  
22 is -- that's the only objection they've got, that word  
23 recommend because that would be attorney advice. But  
24 that bit of attorney advice, I'll even agree --

25 THE COURT: But that's out, that was out as

1 part of our record.

2 MR. POLLACK: I agree. That's why I'll even,  
3 since I'm a generous guy, I'll agree to a partial  
4 waiver if you want. As to that document, the  
5 privilege, whatever there is, is waived but that's  
6 gone.

7 THE COURT: All right, Mr. Brody?

8 MR. BRODY: Well, I don't think --

9 THE COURT: Because that was part of the  
10 testimony.

11 MR. BRODY: It was part of the testimony but  
12 I don't think there was -- I don't think the Court's  
13 waiver holding as to the question that was posed to Mr.  
14 Conlon about Texas Two-Step and his recommendation was  
15 so broad as to encompass the entirety of the November  
16 5th e-mail. There can't be a -- there certainly can't  
17 be a waiver of anything in there by Mr. Pollack because  
18 it's J and J's privilege.

19 And we had proposed two very minor  
20 redactions, as the Court saw. I think the Court saw  
21 both a redacted and an unredacted version. We tried to  
22 be as narrow as possible based on objections that we  
23 think it should still be able to maintain. Obviously,  
24 the Court has seen that, the Court understands what its  
25 ruling was, understands the scope of its waiver ruling

1 and so obviously, the Court can make a decision on  
2 which version will come into the record.

3 THE COURT: I think we're going to stand by  
4 -- we'll accept it with the J and J recommendations  
5 (sic).

6 JUDGE SINGH: No, the redactions --

7 THE COURT: Redactions, I'm sorry.

8 JUDGE SINGH: -- approved from our  
9 perspective.

10 MR. BRODY: Yes, thank you.

11 THE COURT: And then, there was another  
12 objection.

13 JUDGE SINGH: The objections to the attorneys  
14 eyes only materials.

15 THE COURT: Correct, yeah. What are your  
16 thoughts with regard to those records, then, Mr.  
17 Pollack? Because they don't really address -- they're  
18 not any issue with regard to credibility or impeachment  
19 as it relates to Mr. Birchfield. Really, it goes to --  
20 it's impeaching Mr. Conlon and Mr. Conlon has counsel  
21 and I didn't see any objection from, I don't think  
22 Judge Singh did, with regard to any objection from Mr.  
23 Conlon's attorney.

24 MR. POLLACK: Mr. Conlon's Counsel doesn't  
25 have it, it wasn't served on him. So he -- with all

1 due respect, Judge, that's unfair. They were not given  
2 the opportunity to be heard. But remember, Andy is  
3 being tied part and parcel under the broad application  
4 of R.P.C. 1.6, which addresses an attorney, meaning Mr.  
5 Conlon, disclosing information.

6 But to me, the -- the -- it is blatantly  
7 unfair and certainly, it goes to credibility, at a  
8 minimum. It has to go to the credibility of those  
9 documents, at a minimum, that J and J had these  
10 records. Mr. Haas' certification is, we've got an  
11 incredible computer system, everything gets shoved in  
12 there, we had this stuff months ago.

13 So why did they wait until Jim Conlon is off  
14 the stand and they have a legion of lawyers, a billion  
15 dollars to blow on defense and yet they sandbagged Jim  
16 Conlon with this document after he's off the stand and  
17 back home. That's outrageous. Confrontation clause.  
18 He has an ethics hearing in Ohio or Illinois, wherever  
19 he lives.

20 THE COURT: Iowa.

21 MR. POLLACK: Whatever, it's all the same,  
22 it's west of the Mississippi. But the bottom line is,  
23 the fact is that he has no chance to rebut it himself.  
24 Second of all, I strongly and incredibly disagree, when  
25 you look at 99 percent of the documents; I don't



1 recall, I can't remember, I can't really -- that's not  
2 the way I remember it.

3 There's only a few where they say there's  
4 something and then look at the redactions. The  
5 redactions are, I had incredibly detailed discussions  
6 regarding, blank. In fact, here's a memo from me  
7 regarding, blank. So how does this Court ever make any  
8 sense out of what was allegedly discussed? Because  
9 while it's true, under UNA, they had the choice of  
10 putting it in, I think that they have to actually make  
11 their case.

12 And right now, all it says is yes, what I  
13 conceded with you, Judge Porto, on the very first day.  
14 Jim Conlon was a lawyer at Faegre. He worked on super  
15 secret J and J stuff, I've never denied it. He was a  
16 lawyer and he gave advice but how do I, representing  
17 Andy Birchfield, ever confront the question; did Jim  
18 Conlon learn anything during the course of that  
19 representation that is disclosed? That's not been  
20 proven at all but even if it was, was it significantly  
21 harmful? And I have to rely on both prongs, right?

22 I'm not giving up the second part of UNA. So  
23 it worries me deeply about admitting these documents  
24 after the fact, at the end of the hearing, once Mr.  
25 Haas and Murdica and Conlon are gone and suddenly, I

1 get these documents. I object to their introduction.

2 THE COURT: Mr. Brody? I mean, they go  
3 directly to Mr. Conlon's testimony.

4 MR. BRODY: They do, they go directly to Mr.  
5 Conlon's testimony and --

6 THE COURT: And they weren't provided to Mr.  
7 Conlon's attorney?

8 MR. BRODY: Well, it's attorney's eyes only.

9 MR. POLLACK: No.

10 THE COURT: Right.

11 MR. POLLACK: They were not.

12 MR. BRODY: We followed the Court's  
13 instruction. Now, as Your Honors know, I sought to  
14 offer them while Mr. Conlon was on the stand and the  
15 Court's decision was, no, let's wait and you know, when  
16 you go through the transcript, you'll see the number of  
17 places where in response to his testimony, I said, you  
18 know, here's another place where I would bring a  
19 document out now, if permitted.

20 The Court's preference was announced after  
21 the lunch break on April 10th was, if there are areas  
22 where you believe that he perjured himself and you have  
23 that impeachment, you know, provide that impeachment.  
24 We have submitted that impeachment in-camera and  
25 attorney's eyes only at the Court's direction.

1           You know, as to the question that Mr. Pollack  
2       asked. Well, how does the Court make sense of what was  
3       submitted, of what the documents show or don't show?  
4       That's really an argument about the weight that Mr.  
5       Pollack believes the Court should give those documents  
6       and certainly, I expect the parties will be making  
7       arguments about the weight the Court should give all of  
8       the documents that have been provided and are part of  
9       the record, including, you know, including documents  
10      like Plaintiff's P-3 that Mr. Conlon brought with him  
11      to his testimony on April 10th.

12           And so the answer to that one is easy. You  
13      know, the answer to the objection is, we sought to  
14      offer these while Mr. Conlon was on the stand as  
15      impeachment. We followed the Court's direction. We're  
16      submitting them --

17           THE COURT: Well, there's also a concern  
18      about the waiver of the privilege also. That was, you  
19      know, critical to the Court's thoughts in that regard.  
20      So it wasn't that we just blanketly said, don't  
21      disclose them. It's just, we were concerned about the  
22      privilege.

23           MR. BRODY: Right and the Court addressed  
24      that in its invitation that we make redactions and  
25      obviously, Your Honor said, well even with redactions,

1       you submit them and I may find that there has been a  
2       waiver or not a waiver. You made that point during the  
3       hearing on April 10th and so that's where we stand.

4               We followed the Court's direction, you know  
5       and we submitted the materials, they are impeachment  
6       materials and I am sure that we will have arguments  
7       from Mr. Pollack and Beasley Allen as to the weight  
8       that the Court should give them.

9               THE COURT: All right. I think Judge Singh  
10       and I would just like to discuss briefly with regard to  
11       that, with regard to P-3.

12              MR. BRODY: Yes.

13              THE COURT: And then the for your eyes only  
14       privilege material.

15              MR. BRODY: Certainly.

16              THE COURT: We'll take five, okay? We'll go  
17       off the record.

18              (Off the record, back on the record)

19              THE COURT: Thank you, you may be seated.  
20       Counsel, the Courts are going to maintain its position  
21       with regard to the attorney eyes only privileged  
22       material. Argue the weight, you know, how much, you  
23       know but maintain the privilege that's been asserted,  
24       okay? So you can reference but maintain the privilege.  
25       That goes to the weight with regard to the issue here.

1 As it relates to, what, P-5? The Court does  
2 not require or need any additional testimony, all  
3 right?

4 MR. BRODY: Thank you, Your Honor.

5 THE COURT: All right?

6 MR. BRODY: Thank you, Your Honor.

7 THE COURT: You're welcome. Judge Singh?

8 JUDGE SINGH: Just one Federal Court footnote  
9 as to the attorneys eyes only submission. To the  
10 extent the parties address something substantive that  
11 has been submitted with that designation, we anticipate  
12 it will be appropriately filed under seal, on the  
13 Federal Court's docket, pursuant to our local civil  
14 rule.

15 THE COURT: And the same thing with regard to  
16 E-Courts.

17 MR. BRODY: Thank you, Your Honors and as to  
18 the briefing, just to confirm. Two weeks, simultaneous  
19 submission and then replies seven days after that?

20 JUDGE SINGH: Correct.

21 THE COURT: That's correct.

22 MR. BRODY: Great, thank you.

23 THE COURT: Counsel, thank you.

24 MR. POLLACK: Thank you, Your Honors.

25 MR. HAAS: Thank you, Your Honors.

THE COURT: You're welcome.

(Proceeding concluded at 1:42:57 p.m.)

\* \* \* \*

CERTIFICATION

I, Nitsa Carrozza, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, timestamp from 09:38:36 a.m. to 01:42:57 p.m., is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings, as recorded.

/s/ Nitsa Carrozza

Nitsa Carrozza

AD/T 639

AOC Number

Phoenix Transcription LLC

Agency Name

05/07/2024

Date